

THE INDIAN LAW REPORTS.

ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

REPORTED BY:

Privy Council ... J. V. WOODMAN, *Middle Temple.*

High Court, Allahabad ... W. K. PORTER, *Gray's Inn.*
J. M. BANERJI, *Inner Temple.*

VOL. XXXVII.
1915.

ALLAHABAD:

PRINTED AND PUBLISHED BY THE SUPERINTENDENT, GOVERNMENT PRESS,

AND PUBLISHED AT THE GOVERNMENT BOOK DÉPÔT.

UNDER THE AUTHORITY OF THE GOVERNOR GENERAL IN COUNCIL.

Price, Re. 1.

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had been living with their father as a joint Hindu family obtained under the will of their father, in whose hands it was separate property, a considerable amount of movable and immovable property. The property bequeathed was divided by the will into three lots; but the legatees still continued to live as a joint Hindu family and the property of all was managed for a series of years by one member of the family acting as if he were the karta of a joint Hindu family.

Held, on suit by the widow of one of the members of the family to recover from the manager her deceased husband's share of money received by the defendant as manager, but owned by all the three members of the family in equal shares, that the suit was not a suit for "money had and received," but was one to which article 120 of the first schedule to the Indian Limitation Act applied.

Parsotam Rao Tantia *v.* Radha Bibi 318

ACTS—1908—IX (INDIAN LIMITATION ACT). SCHEDULE I, ARTICLE 62—*Limitation—Succession certificate obtained by one of the heirs of a deceased person—Suit by remaining heir for recovery of her share.*] A certain Muhammadan in the year 1903 obtained a succession-certificate to realize debts due to his deceased uncle and realized some of those debts. In the year 1913, the widow of his brother, who had died subsequent to the death of his uncle, brought the present suit for her husband's share of the money realized. *Held,* that article 62 of the first schedule to the Indian Limitation Act, 1908, governed the suit, and as no money had been realized by the holder of the succession certificate within three years of the suit, it was barred by limitation. *Amina Bibi* v. *Najm-un-nissa Bibi,* I. L. R. 37, All., 233, *Parsotam Rao Tantia* v. *Radha Bai,* I. L. R., 37 All., 318, *Mashi-ud-din* v. *Imtiaz-un-nissa Bibi,* I. L. R., 37 All., 40, *Mahomed Wahib* v. *Mahomed Ameer,* I. L. R., 32 Calc., 527, followed, *Umardaraz Ali Khan* v. *Wilayat Ali Khan,* I. L. R., 19 All., 169, distinguished.

Abdul Ghaffar *v.* Nur Jahan Begam 434

————————SCHEDULE I, ARTICLES 91 AND 120—*Suit to aset aside a mortgage—Mortgage deed executed without consideration and not intended to be operative—Cause of action.*] A suit to set aside a mortgage-deed was brought nine years after its execution on the ground that the defendant only recently threatened to bring a suit on the basis of it, though when it was executed it was never intended to be acted upon, no consideraation having passed for it. *Held,* that the suit was barred by limitation, no matter whether article 91 or article 120 of the first sckedule to the Limitation Act applied to the suit, the facts entitling the plaintiff to have the document set aside having been known to him from the very outset. *Singarappa* v. *Talari Sanjivappa,* I. L. R., 28 Mad., 349, and *Vithai* v. *Hari,* I. L. R., 25 Bom., 78, referred to.

Qasim Beg *v.* Muhammad Zia Beg 640

————————SCHEDULE I, ARTICLES 125 AND 120—*Hindu law—Hindu widow—Suit for declaration that alienation by widow enures only for life—Reversioners—Right of suit.*] *Held,* that although the existence of nearer reversioners may be a bar to a more remote reversioner suing for a declaration that an alienation made by a Hindu widow does not enure for a longer period than the life-time of the widow, yet he is not entitled to wait until limitation has expired in respect of all the nearer reversioners before bringing his suit. The period of limitation for such a suit is, under article 125 of the first schedule to the Indian Limitation Act, 1908, twelve years from the date of the alienation for nearer and more remote reversioners alike.

Kunwar Bahadur *v.* Bindraban 195

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pay the principal amount secured in ten years by instalments of Rs. 625 yearly and that interest should be paid monthly. There was this furt[illegible]
month,
or no [illegible]
those c[illegible]
the int[illegible]
of a su[illegible]
property[illegible]
this further provision:—"If the mortgagee in order to get interest does not bring a suit in default of any instalment and we are unable to pay the money, the interest should continue up to the stipulated period of ten years and after it up to the date of realization." No payment was ever made of either principal or interest, and the mortgagees ultimately brought a suit on the mortgage on the 12th of June, 1912.

Held by RICHARDS, *C. J.* and TUDBALL, *J* (BANERJI, *J., dissenting*) that the suit was barred under article 132 of schedule I to the [illegible] money having become [illegible] *ideva Mudaliar* v. [illegible] *Butcher*, 2 Q B. D., [illegible] 24 Calc., 281, and [illegible] R., 20 Mad., 242, referred to.

[illegible] *dan*, I. L. R., 22 [illegible] R, 29 All., 431, [illegible] 371, *Ajudhia* v. [illegible] *Mahabeer Singh*, [illegible]

period expires.

Gaya Din *v.* Jhumman Lal 400

——————SCHEDULE I, ARTICLE 134—*Mortgage—Sale by mortgage—Suit for redemption by mortgagor against mortgagee and vendees—Plea of purchase for consideration —Omission of the words "in good faith" in article 134.*] The omission of the words "in good faith" from the article 134 of the first schedule to the Limitation Act of 1908 does not entitle a person who purchases with full knowledge that his vendor's title is merely that of mortgagee to the benefit of the article.

Drigpal Singh *v.* Kallu 660

——————SCHEDULE I, ARTICLE 164—[illegible]

of the decree prior to 1910, and, therefore, her application was

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Abdul Hakim *v.* Karan Singh 646

——————————ORDER IX, RULES 6 AND 9]—When the plaintiff and his pleader are both absent on the day fixed for the hearing of a case and the court does not intend to give them another opportunity of appearing, it ought not to decide the suit on the merits but should dismiss it for default of appearance.

Phul Kuar *v.* Hashmatullah Khan .. 460

——————————ORDER IX, RULE 13; ORDER XXXII, RULE 3—*Guardian* ad litem—*Illusory appointment of guardian—Competence of minors to have a decree passed without their being represented set aside.*] A suit was brought against certain minor defendants naming as guardian *ad litem* their uncle, who was also a

plaintiffs did not deposit any amount for the expenses of the guardian, who did not take any steps to defend the suit or to inquire whether there was a defence. A decree was passed *ex parte* against the minors, and an application on their behalf, through their mother, to have the case restored was rejected. The courts below found that the decree was not void and dismissed the suit. *Held*,

Held also, that the minors were not debarred from bringing this suit by reason of their not having applied to have the *ex parte* decree set aside under order IX, rule 13, of the Code of Civil Procedure.

Bhagwan Dayal *v.* Pran Sukh 179

——————————ORDER IX, RULE 13—*Decree* ex parte—*Application to set aside decree—Appeal—Decree confirmed in appeal before hearing of application to set aside.*] When the High Court has

Mathura Prasad *v.* Ram Charan Lal .. 208

——————————ORDER XXI, RULE 12, *See* Execution of decree 527

——————————ORDER XXI, RULE 89—*Execution of decree—Application to set aside the sale within limitation—Money tendered but not received through Treasury Officer's action.*] The judge-

refused to take it because there was not sufficient time to count it and also because he thought that it could be paid at any time within three days of the tender. The judgement-debtor paid it the next day, which was beyond thirty days after the sale. *Held*, that

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HINDU LAW—*Inheritance—Mitakshara law—Succession of sapindas of same and different degrees—Uncle of half blood opposed as heir to son of uncle of whole blood—Civil Procedure Code (1882), sections 317 and 231—Execution of mortgage decree by one of several decree-*

[illegible]

distinguished.

The provisions of section 317 of the Code of Civil Procedure, 1882, were designed to create some check on the practice of making so-called benami purchases at execution sales for the benefit of judgement-debtors, and in no way affect the title of persons otherwise beneficially interested in the purchase

One of three joint decree-holders of a mortgage decree alone took out execution under section 231 of the Code, stating that the

[illegible]

R., 317, followed.

Ganga Sahai *v.* Kesri 545

————*Inheritance—Mitakshara—Benares school of law—Great grandson of grandfather of deceased made owner—Grandson of great-grandfather of deceased—*" Putra ", *interpretation of—Lineal and collateral descendants—Blood relationship or propinquity among* gotrajas—*Test is capacity to offer oblations—Introducing into the decision the opinion of another judge not a party to the judgement—Practice not approved.*] On this appeal, in which the question for decision related to the order of succession under the Mitakshara as expounded in the Benares school of Hindu law, among the collateral kindred belonging to the same parental stock as the last male owner, who died leaving no male issue

[illegible]

The word "*putra,*" which when used in relation to the last owner signifies and includes, "son, grandson and great grandson", thus including three degrees in the direct line of descent, is not to be construed in a literal and restricted sense when used in connexion with collateral relatives such as brother, uncle or granduncle.

The following cases were referred to and discussed :—*Rutcheputty Dutt Jha* v. *Rajunder Narain Rae*, 2 Moo. I. A., 132 (153); *Bhyah Ram Singh* v. *Bhyah Ugur Singh*, 13 Moo. I A., 373 : *Kureem Chand Gurain* v. *Oodung Gurain*, 6 W. R., 158 : *Kalian Rai* v. *Ram Chandar*, I. L. R., 24 All., 128 ; *Rachava* v. *Kalingapa*, I. L. R., 16

THE

INDIAN LAW REPORTS.

Allahabad Series

APPELLATE CIVIL.

1914
June, 30.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

MAQBUL FATIMA AND OTHERS (PLAINTIFFS) *v.* AMIR HASAN KHAN AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), *sections* 11 *and* 13—Res judicata—*Foreign judgement—Effect of decision in British India as to the title to part of an estate on a suit filed in Rampur for possession of another portion of the same estate situated there.*

Certain claimants of the estate of a deceased person, which was situated partly in the Bareilly district and partly in the state of Rampur, sued in Bareilly to recover the portion situated there, and obtained a decree. Other claimants filed a similar suit in Rampur in respect of the portion situated there.

Held, on suit by the plaintiffs in the Bareilly court for a declaration that the judgement of that court operated as *res judicata* in respect of the suit in Rampur and for an injunction restraining further proceedings in the Rampur Court, that neither relief could be granted.

THE facts of this case were as follows :—

One Nawab Altaf Ali Khan died, leaving a considerable estate, situate partly in Bareilly and partly in the native state of Rampur. He left him surviving Mohamdi Jan, his widow, and Maqbul Fatima, his daughter. Before the death of the Nawab a dispute arose as to the future succession to his property, which was referred to arbitration, and it was decided as between himself, his wife and his daughter, by an award, dated the 31st of December, 1893, that the Nawab's zamindari was to be transferred to his daughter. The defendants as *asbas* of the Nawab claimed their share in the property. Previous to the present suit the plaintiffs brought a suit against the defendants with respect to the portion of the property situate in Bareilly for a declaration that the Nawab was a *Shiah* at the time of death and the defendants as *asbas* had no right to the property. That suit was decreed by the first court and

* First Appeal No. 361 of 1913 from a decree of Baijnath Das, Subordinate Judge of Bareilly, dated the 3rd of November, 1913.

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the decree was upheld by the High Court in F. A. 149 of 1911, on the 6th of November, 1912.

While that suit was pending in Bareilly, the present defendants brought a suit against the present plaintiffs in the Rampur court claiming half the estate situate in Rampur as *asbas* of the Nawab. They were met with the plea that the entire property of the Nawab had been transferred *inter vivos* to his daughter, and the defendants had no right to the property, as the *asbas* were excluded under the *Shiah* Law. The preliminary issue in the Rampur court was:—" Whether the High Court decree operated as *res judicata ?*"

The plaintiff, thereupon, brought this suit for a declaration that the judgement of the British court operated as *res judicata* in all subsequent proceedings between the parties, even in the Rampur court,and for an injunction restraining the defendants from continuing their suit in the Rampur court.

The court of first instance dismissed the suit. The plaintiffs appealed.

Mr. *B. E. O'Conor* (with him Dr. *Satish Chandra Banerji*, Mr. *Ibn Ahmad*, Babu *Preonath Banerji*, and Babu *Lalit Mohan Banerji*), for the appellants:—

This was a suit for a declaration that the decision in the previous suit between the parties at Bareilly was *res judicata*. In the Rampur suit no question arose which did not arise in the first suit. The plaintiff did not seek to tie the hands of the Rampur court. The defendants resided in British India and relief was asked for against them personally. The Civil Procedure Code in Rampur was the same as in British India. In a case for annuity chargeable on both English and Irish properties the party that had been defeated in the English Court went to the Irish Court for the same relief and the suit in the Irish Court was restrained by injunction and in the same way it was asked to grant an injunction in the present case. In cases where foreign courts were concerned, for the purpose of *res judicata*, section 13, and not section 11, of the present Code was applicable. The case of *Lachmi Narain* v. *Raja Pratab Singh* (1) described the relations between Rampur and British India and a history of Rampur was given showing

(1) (1878) I. L. R., 2 All., 1.

how the districts (within which the property is situate) were ceded as *Ilaqa Jadid* to Rampur after the Mutiny. On representation by the residents of *Ilaqa Jadid* the Nawab of Rampur by a *rubkar*, dated the 6th of October, 1864, made the British Law as it then existed applicable to the ceded districts. The legal rights those men had before the territory went over to Rampur were given to them by the Nawab of Rampur. The provisions of section 13 of the present Code were different from the provisions as to foreign judgements in the previous Code. The change in the law had been progressive. The Code of 1859 was silent as to foreign judgements. The provisions as to foreign judgements were introduced in the later Codes, but section 13 of the present Code was a step forward. It was made wider and was more comprehensive. By the present Code a foreign judgement was made conclusive not only as to matter in issue in the suit but also as to any matter directly adjudicated upon between the parties. In the Rampur suit all the grounds of attack and defence were the same as in the Bareilly suit, the only difference was that the two suits claimed reliefs as to different parcels of land.

The Hon'ble Dr. *Tej Bahadur Sapru*, (with whom Mr. *Jawahar Lal Nehru* for the Hon'ble Pandit *Moti Lal Nehru*) for the respondents, was not called upon.

RICHARDS, C. J., and TUDBALL, J.—This appeal arises out of a suit brought by the plaintiffs against the defendants for reliefs set forth in the following words:—

"(a) That it be declared that the 'judgement', dated the 2nd of February, 1911, by the Subordinate Judge of Bareilly, between the parties, and upheld by the Honourable High Court on the 6th of November, 1912, is binding between the parties, and operates as *res judicata* against the defendants on the points heard and decided between them in all subsequent proceedings *even in the Rampur court.*

"(b) That the defendants be restrained by a perpetual injunction from continuing their suit in the court of the District Judge of the Rampur State against the plaintiffs, which they have instituted there for the recovery of a moiety of the estate situated in the ceded district of Rampur * * * * * *."

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It will be convenient very shortly to state here the facts which led to the institution of the present suit. At one time one Nawab Muhammad Altaf Ali Khan was the owner of considerable property situated partly in Bareilly and partly in the Rampur State. Upon the death of Nawab Muhammad Altaf Ali Khan disputes arose between the plaintiffs and the defendants as to the title to the property situated in both places. The plaintiffs instituted a suit before the Subordinate Judge of Bareilly for a declaration of their title in respect of so much of the property as was situate in the district of Bareilly. That suit resulted in favour of the plaintiffs. While it was pending the defendants instituted another suit in Rampur, claiming possession against the defendants in that suit (the plaintiffs in the present suit) of the property situate in Rampur. Thereupon the plaintiffs instituted the present suit claiming the reliefs set forth above.

There can be no doubt that if all the property was situated in British India, the decision of the Subordinate Judge of Bareilly, confirmed by the High Court, would operate as *res judicata* against the defendants. The difficulty is that part of the property is situated in Rampur, outside British India.

It is pointed out on behalf of the plaintiffs that they do not ask the court to issue any injunction to the court in Rampur and that the relief that they claim is against the defendants personally. It is strongly urged that even in Rampur the decision that was given in British India in respect of the Bareilly property is absolutely conclusive, and that therefore, the defendants ought not to be allowed to reopen the matter in Rampur, and put the plaintiffs to the expense and inconvenience of defending the suit in that State.

Assuming for a moment that this Court has power to grant an injunction which in effect would restrain proceedings in the Rampur State (even though the injunction is not directed to the Rampur court) it is necessary to consider whether or not the plaintiffs are entitled to a declaration "that the judgement of the Subordinate Judge of Bareilly operates as *res judicata* in the Rampur State." It is said that in the district in Rampur, in which the property is situate, the laws in force in British India are observed and that this condition has been observed by the

Ruler of the Rampur State ever since the *ilaqa* was granted to the State in recognition of services in the Mutiny. A document is on the record called "Dastur-ul-Amal" in which it is stated that "the affairs and cases of the new *ilaqa* shall be decided in accordance with the laws in force in British India." It was also stated at the Bar that the Code of Civil Procedure has been printed in Rampur for the use of the *ilaqa*. No copy of this Code was produced. It might be difficult to decide, were it necessary to do so, that the meaning of the Dastur-ul-Amal was that not only existing laws but all future laws, including adjective law like the Code of Civil Procedure, were to apply to the *ilaqa*. We will, however, assume that a Code of Civil Procedure in all respects the same (with the necessary modifications to make it applicable to the State) is in force in Rampur so far as this *ilaqa* is concerned. Section 11 of the Code of Civil Procedure is as follows:—

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit, or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

The issues in the suit in Rampur are said to be, and probably are, identical with the issues in the suit that was tried in Bareilly, but the Subordinate Judge in Bareilly was not competent to try the suit in respect of the property which is situated in Rampur. It seems, therefore, that so far as section 11 of the Code of Civil Procedure is concerned the judgement of the Subordinate Judge of Bareilly does not operate as *res judicata* in Rampur.

But it is contended that section 13 of the Code of Civil Procedure makes the judgement absolutely conclusive, because the issues, though not the cause of action, are the same. Section 13 is as follows:—

"A foreign judgement shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title, except" as in the same section provided.

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THAMMAN SINGH v. DAL SINGH.

Pandit *Mohan Lal Sandal* (with him Mr. *Ibn Ahmad*):—

An adopted son is not a lineal male descendant of his natural father within the meaning of section 22 of the Agra Tenancy Act; *Lala* v. *Nahar Singh* (1), *Nandan Tiwari* v. *Raj Kishore Rai* (2). When a person is adopted in another family he is cut off from the natural family and does not inherit in that family. See Mayne's Hindu Law, 8th edition, para. 172, p. 229. Kewal is therefore not the brother of Hansi.

Mr. *E. A. Howard*, for the respondents:—

The personal law of parties does not apply; there is a special law of inheritance provided for by section 22 of the Agra Tenancy Act, which alone applies to the present case; *Ali Bakhsh* v. *Barkatullah* (3).

Pandit *Mohan Lal Sandal*, was not heard in reply.

RICHARDS, C.J., and TUDBALL, J.—This appeal arises out of a suit brought by one Kewal Singh to recover possession of certain immovable property comprising an occupancy holding. The occupancy holding belonged at one time to Puhap Singh. Puhap Singh had a son Hansi and a son Kewal, the plaintiff. On the death of Puhap Singh, Hansi became the occupancy tenant. Kewal had been adopted into another family. On the death of Hansi the defendant Thamman Singh entered into possession. Kewal Singh then brought the present suit alleging that he was entitled under section 22 (*c*) of the Tenancy Act to the occupancy holding. He also alleged that Thamman Singh was illegitimate.

The court of first instance dismissed the suit. The lower appellate court reversed the decision of the court of first instance and decreed the plaintiff's suit. Hence the present appeal.

In our opinion the decree of the court of first instance is correct and must be restored. Unless Kewal Singh can be said to be the brother by the same father as Hansi's, he has no right to the occupancy holding, even on the assumption that Thamman Singh is illegitimate. In our opinion once a boy has been adopted into another family he ceases to be a "lineal descendant" of his natural father. This was expressly held by a Bench of this Court in the case of *Lala* v. *Nahar Singh* (1). In principle exactly the same view was taken in the case of *Nandan Tiwari* v. *Raj Kishore Rai* (2). We agree with both these authorities.

(1) (1912) I. L. R., 34 All., 658. (2) Select Decisions, 1904, No. 5.
(3) (1912) I. L. R., 34 All., 419.

'he respondents rely upon the case of *Ali Bakhsh* v. *Barkat*- 1914
, (1), and quote the following passage from the judgement :
our opinion the personal law of the parties has nothing to do
the rule of succession which is laid down by section 22 of
enancy Act." In our opinion this remark of the Judges
be read in connection with the particular facts of the case
'e them.

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he result is that the appeal is allowed, the decree of the court
r set is aside and the decree of the court of first instance is
red with costs in all courts.

Appeal decreed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

1914 *July*, 6.

IUNICIPAL BOARD OF AGRA AND ANOTHER (DEFENDANTS) v SUDARSHAN DAS SHASTRI (PLAINTIFF).*

Public road—Metalled and unmetalled portions equally part of road—Right of public way.

'here the question is as to the breadth of a public road, it must be taken all the ground over which the public have a right of way is part of the ; the mere fact that part of the road may be metalled for the greater nience of the traffic will not render the unmetalled portion on each side he less a public road or street.

'HIS was a suit to recover from (1) the Municipal Board of , and (2) the Secretary of State for India in Council damages lleged trespass in respect of certain land. The plaintiff ;ed that he was the zamindar of mauza Basai, a suburb of ı, including a large portion of the abadi of Tajganj, which za included many roads, streets and markets and in particutwo places, known as Nanda Bazar and Tulshi Chabutra, 'e hawkers used to sell their wares by permission of the ntiff who derived an income from them of some Rs. 265 annum. The plaintiff stated that the Joint Magistrate of ı, either as Magistrate or as Vice-Chairman of the Municipal rd, had prohibited the hawkers from selling their wares at places where they had been accustomed to do so; and further

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First Appeal No. 268 of 1912 from a decree of Baijnath Das, Subordinate ;e of Agra, dated the 20th of March, 1912.

(1) (1912) I. L. R., 34 All., 419.

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The court below has found on this issue that the place on which the plaintiff alleged that hawkers were accustomed to sit was no part of the road, at least this is what we understand the finding to be. The court seems to have thought that the only part of the road which could be said to be the public road was the part that was actually metalled In our opinion this is clearly wrong. We are unable from the maps, and from any information either party can give us, to ascertain with any accuracy the places in which the hawkers sit; but in our opinion all the ground, whether metalled or not, over which the public had a right of way, is just as much the public road as the metalled part. The court would be entitled to draw the inference that any land over which the public from time immemorial had been accustomed to travel was a public street or road, and the mere fact that a special part of it was metalled for the greater convenience of the traffic would not render the unmetalled portion on each side any the less a public road or street. With this explanation we refer an issue to the court below, namely, whether or not the land in dispute is part of the public road.

The court may take any additional evidence relevant to the above issue that the parties may adduce On return of the finding the usual ten days will be allowed for filing objections. We direct the court below in returning its finding to send a proper map marking distinctly the lands in dispute and their surroundings. The stand pipes complained of may also be indicated in this map.

We need hardly say that we think it very desirable that the parties should, if possible, settle the question without spending their money in useless litigation.

Issue remitted.

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THE MUNICIPAL BOARD OF AGRA. *v.* SUDARSHAN DAS SHASTRI.

that the Municipal Board had caused to be erected on the plaintiff's land certain stand-pipes (and subsequently some lamp-posts) without the zamindar's consent and without giving compensation. The plaintiff asked for a perpetual injunction prohibiting interference; for a declaration that the plaintiff was entitled to permit vendors to sell their wares in the places appointed by the plaintiff in the *abadi* of mauza Basai, or in the alternative for Rs. 7,000 as compensation, and for removal of the stand-pipes or for Rs. 1,200 as compensation.

The defendants admitted the fixing of water pipes at six places, and that certain persons were restrained from selling articles, as they were obstructing the public way; but they pleaded that the land in respect of which such action had been taken was municipal land, being portions of public streets, and that they had full statutory authority for any action which they had taken.

The court of first instance found that the Nanda Bazar and Tulshi Chabutra did belong to the plaintiff and that he had a right to permit hawkers to occupy the land at the sides of the road "so long as they did not occupy or unreasonably obstruct the road proper", and that he had a right to collect taxes from them. It also found that "the defendants had no right to *appropriate* land for erecting water-stands, &c., without plaintiff's consent or paying him compensation." The court accordingly gave the plaintiff a declaration as to his right to permit (for a consideration) hawkers to vend goods along the road sides in Nanda Bazar and Tulshi Chabutra and restraining the defendants from inte[illegible] with such rights, as well as for Rs. 50 as damages on the Tenancy [illegible]tion of the stand-pi[illegible] any time during the continuance of a tenancy [illegible] land-holder or the tenant may sue for a declaration as to any of the matters therein set forth, class (*d*) "the rent payable in respect of the holding and whether payable in cash or kind."

The learned District Judge was unable to say what the rent payable in respect of certain lands was, because no rent had ever,

* Second Appeal No. 823 of 1912, from a decree of H. E. Holme, District Judge of Allahabad, dated the 25th of March, 1912, confirming a decree of Abdul Rashid Khan, Assistant Collector, first class, of Allahabad, dated the 10th of December, 1909.

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The court below has found on this issue that the place on which the plaintiff alleged that hawkers were accustomed to sit was no part of the road, at least this is what we understand the finding to be. The court seems to have thought that the only part of the road which could be said to be the public road was the part that was actually metalled In our opinion this is clearly wrong. We are unable from the maps, and from any information either party can give us, to ascertain with any accuracy the places in which the hawkers sit; but in our opinion all the ground, whether metalled or not, over which the public had a right of way, is just as much the public road as the metalled part. The court would be entitled to draw the inference that any land over which the public from time immemorial had been accustomed to travel was a public street or road, and the mere fact that a special part of it was metalled for the greater convenience of the traffic would not render the unmetalled portion on each side any the less a public road or street. With this explanation we refer an issue to the court below, namely, whether or not the land in dispute is part of the public road.

The court may take any additional evidence relevant to the above issue that the parties may adduce On return of the finding the usual ten days will be allowed for filing objections. We direct the court below in returning its finding to send a proper map marking distinctly the lands in dispute and their surroundings. The stand pipes complained of may also be indicated on this map.

1914, July, 11.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Tudball

BALDEO PRASAD AND ANOTHER (PLAINTIFFS) v. THE COLLECTOR OF PILIBHIT, (DEFENDANT)*.

Act (Local) No. III of 1899 (United Provinces Court of Wards Act), section 48—Notice of suit—Amendment of plaint—Whether fresh notice rendered necessary by amendment.

Certain persons who intended bringing a suit against a ward under the Court of Wards upon a promissory note of date the 20th of November, 1909,

* Second Appeal No. 994 of 1913 from a decree of H Nelson Wright, District Judge of Bareilly, dated the 26th of June, 1913, reversing a decree of Aghore Nath Mukerji, officiating Subordinate Judge of Bareilly, dated the 16th of August, 1912.

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served upon the Collector by way of notice under section 48 of the Court of Wards Act, 1899, a copy of the proposed plaint, in which they stated:—"For a long time there were money dealings between the shop of the plaintiffs and Kunwar Pohkar Singh, caste Thakur, resident of mauza Ghungchai. Accordingly the said Pohkar Singh, having adjusted his account under the former promissory note, dated the 15th of November, 1907, executed a promissory note on the 20th of November, 1909."

In the course of the suit the plaintiffs discovered that they could not succeed on the promissory note of the 20th of November, 1909, inasmuch as Pohkar Singh was already a Ward of Court at the date of its execution, and accordingly asked and obtained leave to amend their plaint and base their claim entirely on the promissory note of the 15th of November, 1907.

Held that in these circumstances no fresh notice to the Court of Wards was rendered necessary by the amendment of the plaint. *McInerny* v. *The Secretary of State for India* (1) referred to.

THE facts of this case were as follows:—

The plaintiffs instituted the present suit against the defendant, the Collector of Pilibhit, as manager of the estate of Kunwar Pohkar Singh, a ward of the Court of Wards. The plaintiffs in para. 2 of their plaint, dated the 18th of September, 1910, stated their cause of action as follows:—

"For a long time there were money dealings between the shop of the plaintiffs and Kunwar Pohkar Singh, caste Thakur, resident of mauza Ghungchai. Accordingly, the said Kunwar Pohkar Singh, having adjusted his account under the former promissory note, dated the 15th of November, 1907, executed a promissory note on the 20th of November 1909."

The plaintiffs sent to the Collector as notice of their claim under section 48 of the Court of Wards Act, 1899, a copy of the proposed plaint.

The defendant by his written statement dated the 11th of January, 1912, admitted the execution of the promissory note, dated the 20th of November, 1909, but alleged that the estate having been taken under the charge of the Court of Wards on the 28th of October, 1909, the promissory note was, under section 34 of the Court of Wards Act, void and illegal and the plaintiffs had no cause of action. Thereupon, the plaintiffs applied for amendment of the plaint so as to base their suit on the former promissory note, dated the 15th of November, 1907, executed by Pohkar Singh in their favour, and which had been renewed subsequently by the later promissory note, dated the 20th of November, 1909. The

(1) (1911) I. L. R., 38 Calc., 797.

defendant objected to the amendment, on the ground, *inter alia*, that the said amendment constituted a new cause of action and would violate the spirit of section 48 of the Court of Wards Act. The Subordinate Judge, however, allowed the application and the plaint was amended accordingly. The defendant, subsequently filed an additional written statement and raised two further pleas, that (1) the suit was barred by limitation, (2) the plaintiff, not having complied with the provisions of the Court of Wards Act, was not entitled to interest. No plea as to the insufficiency of notice was taken in the pleadings or during the trial.

The court of first instance held that, though the promissory note, dated the 20th of November, 1909, was as a contract void and illegal under section 34 of the Court of Wards Act, 1899, having been executed after the estate had been taken under the charge of the Court of Wards, it nevertheless operated as a good acknowledgment under section 19 of the Limitation Act and saved limitation; and so the suit was decreed.

On appeal by the defendant the District Judge agreed with the court of first instance in the view that section 34 of the Court of Wards Act, 1899," did not debar the ward from making an acknowledgment of a debt which was still alive when the acknowledgment was made." He was, however, of opinion that the amendment in the plaint introduced a new cause of action, and should not have been allowed; and the plaintiffs were not entitled to get a decree on an amended cause of action, of which statutory notice had not been given to the defendant. He, therefore, reversed the decree and dismissed the suit.

The plaintiffs appealed to the High Court.

Pandit *Kailas Nath Katju* (for the Honble Dr. *Tej Bahadur Sapru* with whom Dr. *Satish Chandra Banerji*) for the appellants, urged that notice under section 48 of the Court of Wards Act, 1899, had been given, and the suit had been instituted in pursuance of that notice.

Mr. *A. E. Ryves*, for the respondent, contended that the promissory note, dated the 20th of November, 1909, was absolutely void and illegal and could not operate as an acknowledgment. Section 34 of the Court of Wards Act, 1899, rendered the ward incompetent to

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enter into any contract or make any such acknowledgment which would practically have the same effect. The plaintiffs should not have been allowed to amend their plaint. The amendment introduced a new cause of action altogether. The suit in the first instance was based entirely on the promissory note of the 20th of November, 1909. No notice as required by section 48 was given of the new cause of action to the Court of Wards. The rule as to compliance with the requirements regarding statutory notice is very strict. He cited *McInerny* v. *The Secretary of State for India* (1.)

Pandit *Kailas Nath Katju*, in reply on the question of amendment, submitted that the amendment of the plaint had been rightly allowed. The later promissory note being unenforcible, the plaintiff was entitled in the same suit to fall back upon the earlier promissory note and the original consideration. In the first place, he submitted, that the plaintiff was entitled, as laid down in a series of rulings of this Court, to fall back upon the original consideration without any amendment of the plaint whatever. In the next place the notice given to the Court of Wards was wide enough to cover the case now set up by the plaintiff. The notice is word for word the same as the plaint, and the notice clearly mentions that the promissory note of the 20th of November, 1909, was founded on an earlier promissory note, and represented former money dealings between the plaintiffs and the notice was required so that the Court of Wards may have information as to the nature of the suit going to be filed against them. The phrase "cause of action" in section 48 should not be narrowly construed; *The Secretary of State for India in Council* v. *Perumal Pillai* (2), *Jehangir M. Cursetji* v. *The Secretary of State for India in Council* (3), *Bholaram Chowdhury* v. *Administrator General*, (4).

Further, the plea as to insufficiency of notice was not raised in the court of first instance at all, nor was any issue framed on the point. The defendant must be deemed to have waived the plea of insufficiency of notice and was estopped from urging it for

(1) (1911) I. L. R., 38 Calc., 797.

(2) (1900) I. L. R., 24 Mad., 279.

(3) (1902) I. L. R., 27 Bom., 189 (205).

(4) (1904) 8 C. W. N., 913.

the first time in the lower appellate court; *Manindra Chandra Nandi* v. *The Secretary of State for India* (1), *Bhola Nath Ray* v. *The Secretary of State for India* (2).

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RICHARDS, C.J., and TUDBALL, J.—This appeal arises out of a suit in which the plaintiff claimed to recover the sum of Rs. 1,990-2-0. As originally framed this sum was said to be the amount of a promissory note, dated the 20th of November, 1909, together with interest thereon. The maker of the promissory note was one Pohkar Singh. The Collector of Pilibhit was sued as manager of the estate of Pohkar Singh in charge of the Court of Wards. The defence was that the promissory note was made after the estate had been taken over by the Court of Wards. On this defence being raised the plaintiffs applied for an amendment of their plaint, so as to enable them to fall back on a previous promissory note, dated the 15th of November, 1907. The court of first instance allowed the amendment and decreed the plaintiffs' suit. The amendment as made was, to say the least of it, inartistic.

The defendant objected to the amendment and in his memorandum of appeal a ground was taken that the amendment ought not to have been allowed. The lower appellate court considered that the amendment ought not to have been allowed and dismissed the plaintiffs' suit. Hence the appeal.

Before the institution of the suit the plaintiff served a notice on the Court of Wards in order to comply with the provisions of section 48 of the Court of Wards Act, which provides that "no suit relating to the person or property of any ward shall be instituted until after the expiration of two months after notice in writing has been delivered, stating the name and place of abode, the cause of action, and the relief which he claims." The form that the notice took was a copy of the intended plaint. In our opinion if the amendment which was made by the court of first instance is allowed to stand, the plaintiffs' claim cannot be dismissed on the ground that the provisions of section 48 were not complied with. The notice required by section 48 was in fact served, as provided by the section, and the suit is the same suit notwithstanding that a substantial change has been made as the result of the amendment.

(1) (1907) I. L. R., 34 Calc., 257, (279.) (2) (1912) 17 C. W. N., 64.

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The defendant, however, contends that the amendment ought never to have been allowed and that he was entitled in the lower appellate court to challenge the propriety of the amendment under the provisions of section 105 of the Code of Civil Procedure. There is one reason, and one reason only, why the amendment should not have been made, subject, of course, to such terms as the court should think just. The reason would be that the amendment allowed the introduction of a new cause of action and the defendant was entitled under section 48 of the Court of Wards Act to two months' notice in writing before a suit on foot of the *new* cause of action was instituted. See *McInerny* v. *The Secretary of State for India* (1).

Two questions arise first, whether the amendment ought to have been allowed, and, secondly, whether the notice which the plaintiffs delivered was a sufficient notice of the suit as set forth in the amended plaint. We think that if the effect of the amendment was to introduce a new "cause of action" which was not stated in the notice, then the amendment should not have been allowed, because the defendant would not have received the two months' notice to which he was entitled under the provisions of section 48. If, on the other hand, the cause of action as set forth in the amended plaint was sufficiently stated in the notice which the plaintiffs served, then we think that the amendment was properly allowed.

We now proceed to deal with the case upon the principle which we have mentioned above. We have already stated that the notice which the plaintiffs delivered consisted of a copy of their plaint before the amendment. In this plaint the name and abode of the intending plaintiffs were set forth. So was the relief which they claimed. In paragraph 2, the following statement was made :—"For a long time there were money dealings between the shop of the plaintiffs and Kunwar Pohkar Singh. Accordingly on the 20th of November, 1909, the said Pohkar Singh having adjusted his accounts under the former promissory note executed on the 15th of November, 1907, executed the promissory note sued on." Now suppose that the plaintiffs, after having delivered to the defendant a copy of this plaint as the compliance with section 48 of the Court

(1) (1911) I. L. R., 38 Calc., 797.

of Wards Act, and suppose that prior to the filing of the plaint they had come to the conclusion that they could not succeed on the basis of the promissory note of the 20th of November, 1909, and that they themselves had altered their plaint by alleging that they sued on the note of the 15th of November, 1909, using the note of the 20th of November, 1909, as an acknowledgment. Supposing further that after the filing of their plaint the defendant had pleaded that section 48 of the Court of Wards Act had not been complied with on the ground that the "cause of action" had not been stated as provided by section 48. On the assumptions which we have made, would such a defence have succeeded? If it would, then we think the amendment ought not to have been allowed and that the plaintiff's suit was rightly dismissed by the lower appellate court.

But on the other hand it is necessary to see whether or not the plaint which the plaintiff delivered as a notice under section 48 sufficiently states the "cause of action" as set forth in the amended plaint.

The expression "cause of action" has been defined to be "every fact which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgement of the Court." In paragraph 2 of the unamended plaint the plaintiffs set forth that there had been for a long time money dealings; that the account had been adjusted and a former promissory note given, and that on the 20th of November, 1909, another promissory note had been given. Bearing in mind that the object of section 48 was to give the Collector time to consider the nature of claim against the ward in order that the manager might investigate the matter and if necessary meet the claim without incurring needless costs, we find it impossible to hold that the "notice" delivered by the plaintiff in the present case was not a sufficient statement of the "cause of action" as set forth in the amended plaint. It gave all the information necessary to enable the Collector to investigate the claim and the two promissory notes are practically all the plaintiffs need have proved. If we are correct in this then the amendment was properly made and the plaintiffs' suit ought not to have been dismissed on the ground that the amendment was improper.

to him, who was competent to try it. The District Magistrate made over the case to a magistrate of the second class, who bound over the persons against whom the proceedings were instituted. They appealed to the District Magistrate, who dismissed their appeal, and they thereupon applied in revision to the High Court.

Mr. *G. P. Boys*, for the applicants.

The Assistant Government Advocate, (Mr. *R. Malcomson*) for the Crown.

CHAMIER, J.—This is an application for revision of an order of the District Magistrate of Meerut, dismissing an appeal against an order of a magistrate of the second class of the same district requiring the applicants to give security for their good behaviour for one year. The first point taken is that the second class magistrate had no jurisdiction to hear the case. It appears that the proceedings against the applicants were instituted by a magistrate of the first class, and that this Court, on application made to it, transferred the case from the Court of that magistrate to the District Magistrate with instructions to make it over to some other magistrate, subordinate to him, competent to try it. The District Magistrate then made over the case to Captain Noel, a magistrate of the second class. Under section 526 of the Code of Criminal Procedure this Court had power to transfer the case to another Criminal Court of equal or superior jurisdiction. This Court, therefore, could not have transferred the case to Captain Noel and what this Court could not do the District Magistrate could not do. The selection of the court was left to him, but the transfer was made by this Court. Further, it appears to me that Captain Noel is not one of the magistrates who is competent to conduct proceedings under sections 110 to 119 of the Code of Criminal Procedure. I was referred to the decision of Mr. Justice AIKMAN in the case of *King-Emperor* v. *Munna* (1), in which proceedings under section 107 (2) of the Code had been initiated by a District Magistrate who was competent to do so and had been transferred by him to a magistrate of the first class subordinate to him in the district. Mr. Justice AIKMAN held that when the District Magistrate had in the exercise of the discretion directed the institution of the proceeding,

(1) (1901) I. L. R., 24 All., 151.

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there was nothing in the law to prevent him from transferring the case to another magistrate otherwise qualified to complete the proceedings. There the transfer was to a Magistrate of the first class competent to conduct proceedings under section 107 (1) of the Code. I do not think that Mr. Justice AIKMAN would have held that the District Magistrate was competent to transfer the case to a Magistrate of the third class. On both these grounds I hold that Captain Noel had no jurisdiction to pass an order requiring the applicants to give security for their good behaviour. I, therefore, set aside all the proceedings of Captain Noel and of the District Magistrate. Let the record be returned.

Order set aside.

APPELLATE CIVIL.

1914
August, 1.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

BASDEO (PLAINTIFF) *v.* ULFAT RAI AND OTHERS (DEFENDANTS).*

Adverse possession—Right acquired by—Exproprietary tenancy.

Semble that although a lease-hold or an exproprietary interest can be acquired by adverse possession as against the person who is the lessee or the exproprietary tenant, yet where there never has been a lessee or an exproprietary tenant it is not possible to become such by adverse possession.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case are fully stated in the judgement under appeal, which was as follows :—

"This is a Second Appeal arising out of the following facts :—One Manik Chand died possessed of considerable landed property including one entire *mahal* in village Sarai Imilia. He died leaving a widow who held the property for her life-time. On her death Salik Ram, brother of Manik Chand, took possession of the whole; but litigation followed between the said Salik Ram and the sons of two other brothers. The suit was referred to arbitration and resulted in a decree on an award passed on the 30th of January, 1891. By this decree the entire property of Manik Chand in Sarai Imilia was assigned to Ishri Prasad, the son of a third brother of Manik Chand. Ishri Prasad obtained formal possession under the decree. The present suit relates to certain plots of *sir* land appertaining to the *mahal* in question in Sarai Imilia. The plaintiff is the son of Ishri Prasad, the first defendant is the grandson of Salik Ram, and along with him are impleaded as defendants certain persons

* Appeal No. 9 of 1914 under section 10 of the Letters Patent.

who are admittedly in actual cultivation of the land in suit as sub-tenants. The suit was brought for a determination of the nature of the tenancy and the amount of the rent. The latter portion of suit has failed under circumstances with which I am not now concerned. The dispute before me is between the plaintiff and the first defendant as to the nature of the tenancy. The latter has all along resisted the suit upon three alternative pleas :—

(a) He says he has acquired proprietary rights in the land in suit by adverse possession for more than twelve years.

(b) Failing this, he pleads that his possession has from the first been that of an exproprietary tenant by operation of law.

(c) Failing this again, he pleads that by his long possession he has at least acquired the status of a tenant with rights of occupancy.

"The courts below have concurred in giving the plaintiff a decree that all the defendants (including defendant No. 1), hold as tenants-at-will without any kind of right of occupancy. The first defendant appeals to this Court, and I have also before me a cross-objection by the plaintiff challenging the propriety of the lower appellate courts' order on the question of costs.

"The judgement of the lower appellate court is extremely unsatisfactory. The remark that, "*Respondent* (*i e.*, the plaintiff) does not now claim that they (*i.e.*, the defendants) are mere trespassers, " can only be the result of some misunderstanding as to the precise nature of which I shall not hazard a conjecture. I do not find that the defendant appellant has ever abandoned any of the alternative pleas, as set forth above, upon which he all along contested the suit. Evidently the District Judge was not satisfied that this appellant continued in possession of the plots in suit claiming to be the proprietor of the same, and here perhaps I have before me something of the nature of a finding of fact which I ought to spect in second appeal. Moreover, such a finding seems to me correct on the evidence. The appellants and his predecessors in title, no doubt, continued in possession after the decree of 1891, in the sense that they continued to hold these plots of *sir* land and either to cultivate them personally or to sublet them. Ordinarily, exclusive possession is presumed to be adverse against the rightful owner to the fullest possible extent ; but the circumstances of a case like this are peculiar. It was quite an arguable point whether the proceedings resulting in the delivery of formal possession under the arbitration decree did or did not operate so as to constitute Salik Ram an exproprietary tenant in respect of these *sir* plots If Salik Ram and his descendants after him continued in occupation of these plots against the will of the plaintiff it is for them to make it clear what rights they were all along claiming in respect of the same. when they ask the court to hold that these rights, however disputable in their origin, have now ripened by prescription so that they are no longer assailable. I find that in 1907 Ishri Prasad called the attention of the Revenue Courts, on the mutation side, to the fact that the entries in the village papers, respecting the lands now in dispute were anomalous, and could not be correct as they stood. The Assistant Collector remarked that Gulab Rai (father of the defendant appellant) could have no proprietary rights in this land, and should be recorded as an exproprietary tenant of the same. Gulab Rai acquiesced in this order ; it is the plaintiff

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(the son of Ishri Prasad) who is challenging it by means of this present suit. I have no doubt personally that if Ishri Prasad had at any time sued for the ejectment of Salik Ram or Gulab Rai as trespassers, he would have been met by a plea that they were exproprietary tenants. I accept, therefore, the finding of the courts below that the appellant has not acquired by adverse possession full proprietary rights in respect of this land.

"I am, however, quite unable to concur in the finding that the appellant is a mere tenant-at-will. The first question is whether an exproprietary tenancy was created by operation of law when Ishri Prasad obtained formal possession of the *mahal* in 1891.

"The courts below concur in finding that this is impossible, because the litigation of that year established the fact that Salik Ram's possession had been that of a mere trespasser. This, at any rate, I hold to be clearly erroneous. Salik Ram had entered into possession as nearer reversioner to Manik Chand, and *primâ facie* he was a nearer reversioner in law than his nephews. We do not know on what principles the arbitrators proceeded when they affirmed the rights of the nephews to share in Manik Chand's estate. The whole transaction was of the nature of a family settlement, and I cannot interpret it as necessarily implying that Salik Ram's possession prior to 1891, much less his possession over the particular lands which were by this settlement assigned to one of his nephews, was that of a mere trespasser. The point is, however, debatable on other grounds. If the transaction of 1891 be regarded as in effect a partition of family property by mutual consent, I think the balance of authority in this Court would be against holding that exproprietary rights accrued in respect of the *sir* lands in suit, when the entire *mahal* was assigned to a single co-sharer. If the case turned on this point, it might be necessary for me either to remit an issue, or to enter into a more detailed examination of the evidence.

"I think it sufficient, however, to note that Salik Ram had, at any rate, some sort of an arguable claim to the status of an exproprietary tenant, and so proceed to consider what rights, if any, have accrued by prescription to Salik Ram and his descendants in virtue of their uninterrupted possession from 1891 onwards. A case very similar to the present was before this Court in *Maha Singh* v. *Khoshi Ram* (1). That case would be authority for holding that the appellant now before me has acquired at least the status of an occupancy tenant. It is objected on behalf of the plaintiff respondent that the land in suit is *sir*, and that occupancy rights cannot be acquired in *sir* land: and this point either did not arise or was not considered in *Maha Singh* v. *Khoshi Ram* (1). My own opinion is that the appellant in the present case must be held to have acquired the status of an exproprietary tenant by adverse possession for twelve years and more. I take it to be settled law that it is possible to acquire by adverse possession a right short of full proprietorship. If it be conceded, as I have conceded in favour of the plaintiff, that Salik Ram and his descendants are not proved to have held possession of this land under a clear claim to adverse proprietary title, I do not think it can be denied that they have all along claimed to be at least exproprietary tenants. I do not think the plaintiff is

(1) L. P. A., 38 of 1911, decided on the 7th of May, 1912.

entitled, after some twenty years, to ask the court to go back and hunt for a flaw in their original title to this status.

"For these reasons I accept this appeal, and setting aside the decrees of both the courts below, give the plaintiff a decree declaring that Ulfat Rai, (defendant No 1) holds the land in suit with occupancy rights as an exproprietary tenant, and that the remaining defendants are sub-tenants with no right of occupancy.

"The question of costs is a little difficult. The suit has substantially failed: yet Ulfat Rai has complicated the case and put himself partly in the wrong by setting up his claim to adverse proprietary possession. I order that all parties do bear their own costs throughout: this order disposes of also the plaintiffs' cross-objection."

The plaintiff appealed.

Mr. *M. L. Agarwala,* for the appellant.

Babu *Girdhari Lal Agarwala,* for the respondents.

RICHARDS, C. J., and BANERJI, J.—We are not prepared to endorse as a matter of law that the defendants became under the circumstances exproprietary tenants by reason of being in possession of the property. We are inclined to think that the defendants acquired an absolute title to the property. They have admittedly been in possession ever since the year 1891 and such possession has been without any title. This *primâ facie* would give the defendants an absolute title by adverse possession and it would be upon the persons who were entitled to possession to explain and show that the possession of the defendants was not adverse. The learned Judge of this Court says:—"My own opinion is that the appellant in the present case must be held to have acquired the status of an exproprietary tenant by adverse possession for twelve years and more." We do not think that a person can acquire the "status" of an exproprietary tenant by adverse possession. True it is that a lease-hold or an exproprietary interest can be acquired by adverse possession as against the person who is the lessee or the exproprietary tenant. But we do not think that where there never has been a lessee or exproprietary tenant that it is possible to become such by adverse possession. The respondents have filed no objection to the decision and have not claimed to be proprietors, and therefore we cannot interfere with the decree of this Court. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

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August, 8.

REVISIONAL CRIMINAL.

Before Mr. Justice Piggott.

FARZAND ALI *v.* HAKIM ALI.*

Criminal Procedure Code, section 133—Procedure—Jury—Applicant consulted by Magistrate as to appointment of jury.

In proceedings instituted under section 133 of the Code of Criminal Procedure at the instance of H against F., F. applied for the appointment of a jury, which was granted. He nominated two jurors. The Magistrate called upon H. to nominate two jurors. H. nominated two jurors, and the Magistrate appointed a foreman. The jury by a majority made an order against F.

Held that it is not illegal on the part of a Magistrate to address any inquiry to the applicant with a view to ascertaining the names of respectable and independent residents of the neighbourhood who would be willing to serve on the jury: but the Magistrate should see that he does not appoint friends or partisans of the applicant. The criterion in such cases is whether the person at whose instance the proceedings were instituted was allowed to exercise rights not conferred upon him by law as if he were a party to the litigation. *Upendra Nath Bhuttacharjee* v. *Khitish Chandra Bhuttacharjee* (1), *Kailash Chandra Sen* v. *Ram Lall Mittra* (2) and *Mir Imam Abdul Aziz* v. *Queen Empress* (3) referred to.

IN this case one Hakim Ali filed a petition before a magistrate of the Meerut district in which he complained that one Farzand Ali had recently enlarged his dwelling-house by making certain constructions which had the effect of obstructing a portion of a public way used by the residents of two villages, and that serious inconvenience was thereby being caused to the petitioner and other residents of the neighbourhood. After notice had issued to Farzand Ali, the latter applied in accordance with law for the appointment of a jury to try the question whether the conditional order issued by the Magistrate for the removal of the alleged obstruction was a reasonable and proper order. Farzand Ali, as he was entitled to do, nominated two jurors.

The Magistrate appears to have enquired from Hakim Ali, whether he could suggest the names of two other suitable persons to serve on the jury, and thereupon Hakim Ali presented a petition suggesting the names of two Hindu residents of another village. The Magistrate then proceeded to nominate a foreman.

* Criminal Revision No. 588 of 1914 from an order of Jai Narain, Magistrate, First Class, of Meerut, dated the 24th of April, 1914.

(1) (1896) I. L. R., 23 Calc., 499. (2) (1899) I. L. R., 26 Calc., 869.

(3) Punj. Rec., 1897, Cr. J., No. 4.

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After the majority of the jury had decided the question referred to them in a sense unfavourable to Farzand Ali, the Magistrate proceeded to make his order absolute in accordance with law. Against this order. Farzand Ali applied in revision to the High Court.

Mr. *J. J. Simeon* and Pandit *Uma Shankar Bajpai*, for the applicant.

Dr. *Tej Bahadur Sapru*, for the opposite party.

The Assistant Government Advocate (Mr. *R Malcomson*), for the Crown.

PIGGOTT, J.—This is an application in revision in respect of certain proceedings taken by Magistrace under section 133 and the succeeding sections of the Code of Criminal Procedure. The matter appears to have been brought to the notice of the Magistrate by a petition presented by a person of the name of Hakim Ali. That petition stated in substance that Farzand Ali, who is the applicant now before me, had recently enlarged his dwelling-house by making certain constructions which had the effect of obstructing a portion of a public way used by the residents of two villages, and that serious inconvenience was thereby being caused to the petitioner and other residents of the neighbourhood. After notice had issued to Farzand Ali, the latter applied in accordance with law for the appointment of a jury to try the question whether the conditional order issued by the Magistrate for the removal of the alleged obstruction was a reasonable and proper order. Farzand Ali, as he was entitled to do, nominated two jurymen. I note that he nominated two co-religionists of his own. The Magistrate appears to have inquired from Hakim Ali whether he could suggest the names of two other suitable persons to serve on the jury, and thereupon Hakim Ali presented a petition suggesting the names of two Hindu residents of another village The Magistrate then proceeded to nominate a foreman. It has been brought to my notice in the course of argument that the foreman originally nominated by the Magistrate declined to serve, that the Magistrate thereupon nominated another gentleman, a Muhammadan, and that this nomination was objected to on behalf of Farzand Ali. I have not pursued the history of this objection further because no plea is taken in the petition before me with

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regard to the appointment of the foreman. After the majority of the jury had decided the question referred to them in a sense unfavourable to Farzand Ali, the Magistrate proceeded to make his order absolute in accordance with law. Objection is now taken before this Court that the entire proceedings before the Magistrate, from the date of the order constituting the jury, are illegal and void, by reason of the fact that two of the jurors were appointed on the suggestion of the petitioner Hakim Ali There is authority for this proposition in the cases of *Upendra Nath Bhuttacharjee* v. *Khitish Chandra Bhuttacharjee* (1), *Kailash Chandra Sen* v. *Ram Lall Mittra* (2), in some older cases of the same court referred to in the above decisions, and I have also been referred to the case of *Mir Imam Abdul Aziz* v. *Queen Empress* (3). Now it is certainly expedient that in all proceedings initiated under section 133 of the Code of Criminal Procedure the Magistrate should bear in mind that he is supposed to be acting purely in the interests of the public, and should be on his guard against any tendency to use this section as substitute for litigation in the Civil Courts in order to the settlement of a private dispute. In the present case the question before the Magistrate was whether there had been an obstruction to a public way, to the injury or inconvenience of members of the public entitled to use the same. Hakim Ali had no *locus standi* in the matter, once he had performed what was perhaps his duty as a good citizen in calling the attention of the Magistrate to the existence of the nuisance. In so far, therefore, as the rulings to which I have been referred lay down the principle that it is expedient that Magistrates should be on their guard against allowing a proceeding of this sort to assume the character of a private litigation and allowing it to be treated as a dispute to which two private individuals representing opposite interests are the parties, I am in entire accord with the same. I still more emphatically approve of the principle laid down in the Punjab case above referred to, that it would be highly improper on the part of the Magistrate to appoint to serve on a jury of this sort, the friends or supporters of the person at whose instance the proceedings under Chapter X of the Code of Criminal Procedure are being taken. At the same time, it must be remembered that it is often not an easy matter for a Magistrate to secure the

(1) (1896) I. L. R., 23 Calc., 499. (2) (1893) I. L. R., 26 Calc., 869.
(3) Punj. Rec., 1897, Cr. J., No. 4.

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services of a foreman and two independent jurymen to undertake in the public interests an inquiry of this sort, it may be in some village distant from head quarters. If the rulings to which I have been referred are supposed to lay down the principle that it is illegal for a Magistrate to address any inquiry to the person who first came forward to draw his attention to the existence of the alleged public nuisance, with a view to ascertaining the names of respectable and independent residents of the neighbourhood who would be willing to serve on the jury, then I am unable to concur in any such principle. It clearly goes beyond anything which is to be found in the provisions of the Code of Criminal Procedure itself, and it also goes beyond the requirements of the effective and impartial administration of justice. The criterion, therefore, which I would apply to a case of this sort, is whether the person at whose instance the proceedings were instituted was allowed to exercise rights not conferred upon him by law, as if he were a party to the litigation, and whether as a matter of fact the jurors nominated by the Magistrate could rightly be described as friends or supporters of the aforesaid person. Even in the cases to which I have been referred it is sufficiently clear that the underlying principle, that the revisional jurisdiction of this Court should be exercised only to correct a manifest failure of justice, was clearly recognized. The record before me does not show that Farzand Ali at any time objected in the court below to the two Hindu jurors who were nominated at the suggestion of Hakim Ali. Even in his petition to this Court he has not suggested, much less proved by affidavit, that these persons could be regarded as friends or supporters of Hakim Ali. I have, therefore, no materials before me which would justify the conclusion that these Hindu jurors were other than respectable and impartial residents of the neighbourhood and suitable persons to have been called upon to act as such; on the contrary, the silence of the applicant in revision justifies the opposite presumption. So far therefore from being prepared to hold that the Magistrate's proceedings were illegal or void, I do not find them to be vitiated by an such impropriety or irregularity as would justify the interference of this Court. The application is therefore dismissed.

Application dismissed.

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section 379 of the Indian Penal Code. The findings of the court are that Ghasite was found in the Railway goods-shed with three bags of *gur* in his possession. The evidence shows that he had two companions. The court believing the evidence of Mr. Norton, a mail-engine driver and master of the accused, was of opinion that Ghasite had been sent by his master on an errand to the Loco-sheds to find if Mr. Norton would be wanted to drive an engine that night and being accosted by two thieves gave way to the sudden temptation to join them. He therefore ordered the accused to give security for good behaviour for six months by executing a bond for Rs. 30, with one surety in the same sum.

"Mr. Norton's evidence appears to me most unconvincing. As a mail driver he could only be put in charge of a mail train and all mail trains leave Jhansi between 1·50 p.m. and 4 p.m. The necessity for inquiries at 10 p.m. is not apparent.

"It is notorious that in Jhansi, as elsewhere, railway thieves are chiefly recruited from the lowest grades of railway employés and the servants of superior employés. The accused in this case appears to be a typical railway thief working in concert with two others. Thefts in railway goods-sheds are so persistent and shameless that deterrent sentences should always be passed on conviction. It is not right that the accused should get off practically scot free because his previous good character is vouched for by his master, whose evidence does not appear to be worthy of credit.

"I, therefore, submit this case with the recommendation that the order under section 562 of the Code of Criminal Procedure should be cancelled and a more suitable sentence either of whipping or imprisonment should be awarded."

The parties were not represented.

PIGGOTT, J.—I think there is good deal to be said for the view taken of this case by the District Magistrate, but I am inclined to doubt whether it is worth this Court's while to interfere. The District Magistrate seems to think that this Court in revision can set aside an order under section 562 of the Code of Criminal Procedure and of its own authority substitute for that order a sentence of whipping or of imprisonment. Under sections 439/423 of the Code of Criminal Procedure, this Court certainly could not take

the action suggested. The provisions of section 439 itself empower the High Court in revision to enhance a sentence, but it is clear that no sentence has been passed in the present case. The court *instead of sentencing* the accused has ordered him to enter into a bond to appear and receive sentence when called upon. The point of law thus taken may appear a technical one, but it is closely connected with another question of considerable importance, viz., the question whether an appeal lies against an order under section 562 of the Code of Criminal Procedure. I have recently followed the Punjab Chief Court in holding that an appeal does lie, and that question necessarily depends upon the soundness of the contention that in a case like the present no sentence has been passed. It follows, therefore, that if this Court interferes at all in this matter it can only order the case to be re-tried. Under all the circumstances of the case I do not think it worth while to take this step. Let the record be returned.

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Record returned.

Before Mr. Justice Piggott.

EMPEROR *v* BRIJNANDAN PRASAD AND OTHERS.*

1914 *October, 14.*

Criminal Procedure Code, section 107—Security for keeping the peace—Evidence—Nature of findings required to justify a Magistrate in passing an order under section 107.

In proceedings under section 107 of the Code of Criminal Procedure, it is not enough for the Magistrate to find that unless the persons before him are bound over to keep the peace, there is likely to be a breach of the peace or disturbance of the public tranquillity. He has to find in respect of each and all of such persons that they are likely to commit a breach of the peace or disturb the public tranquillity, or that they are likely to do some wrongful act which may occasion such a disturbance. *Queen Empress* v. *Abdul Qadir* (1) and *Jagat Narain* v. *King-Emperor* (2) referred to.

THE facts of this case were, briefly, as follows:—

There was a controversy between the Hindu and the Muhammadan inhabitants of Najibabad concerning the route of the Dasehra procession. The Hindus were desirous of taking it by a particular route which was objectionable to the Muhammadans, and had been combining to induce the local authorities to sanction the particular route which they wanted; but the

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* Criminal Revision No. 843 of 1914 from an order of L. M. Stubbs, District Magistrate of Bijnor, dated the 8th of September, 1914.

(1) (1886) I. L. R., 9 All., 452. (2) (1910) 7 A. L. J., 1161.

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authorities had refused to do so. Shortly before the last Dasehra, the District Magistrate, thinking it likely that there might be a breach of the peace in connection with the forthcoming procession owing to the somewhat strained relations between the two classes, proceeded to bind over some of the leading Hindus to keep the peace. The persons so bound over applied in revision to the High Court.

Babu *Satya Chandra Mukerji* and Pandit *Rama Kant Malaviya*, for the applicants.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

PIGGOTT, J.—This is an application in revision against an order passed by the learned District Magistrate of Bijnor, directing the twelve applicants to furnish security for keeping the peace under section 107 of the Code of Criminal Procedure. One of the original applicants has since died and the petition has been prosecuted on behalf of the remaining eleven. I may add that the District Magistrate's immediate object in taking the proceedings resulting in the present order was to provide for the preservation of the public peace in the town of Najibabad during the last Dasehra festival. This has now passed off quietly, and from one point of view it might be said that, even though the period for which the applicants were required to furnish security has not yet expired, it has ceased to be a matter of serious importance whether the Magistrate's order is now affirmed by this Court or set aside. The question, however, is one of some public importance, and, if I may judge from the account of the state of public feeling in the town of Najibabad given in the Magistrate's order, it is unfortunately probable that the matter may come up again in one form or another before the district courts, and eventually before this Court. I think it advisable, therefore, to deal with the application as it stands, that is to say, I propose to consider whether the order under revision was or was not a good and proper order on the materials on the record, at the time when it was passed by the Magistrate on the 8th of September last.

One point taken in the petition of revision before me is that the District Magistrate has imported into his judgement

a number of facts personally known to him, of which there is no legal evidence on the record. The District Magistrate frankly admits that he was necessarily in possession, at the time when he instituted this inquiry, of a great deal of information of one kind or another bearing on the question of the propriety or otherwise of binding over these applicants to keep the peace. He suggests that the parties before him were fully aware of this fact, and that their acquiescence in his proceeding with the inquiry, instead of applying for a transfer of the case to some other court, virtually licensed him to import his own personal knowledge into the decision of the case to such extent as he might think proper. I may say that I regard it as a very satisfactory feature of the case that these applicants, while fully aware that the Magistrate *of their district had had occasion to make personal inquiries of* various kinds into the question of the disputes pending between different classes of the community in their town, felt such complete confidence in his impartiality and his anxiety to do justice between all classes of the community, that they had no desire to get the inquiry into this particular matter transferred to any other court. At the same time, they were entitled to ask that the final decision should be based simply and entirely upon evidence legally brought on to the record. To some extent at any rate, it seems to me that this has not been done. There are references in the Magistrate's judgement to confidential papers in his own possession and to other matters which cannot possibly have been in evidence in the case It may no doubt have been inevitable under the circumstances that the District Magistrate should have possessed outside knowledge of these matters, but he would have exercised a sounder discretion if he had kept that knowledge out of the judgement and endeavoured to base his decision entirely upon the relevant evidence in the case.

Another and more important point raised by this application may be stated in this form:—that the findings of fact arrived at, *no matter how, by the District Magistrate, are not such as to* warrant the order which has been passed requiring these applicants to furnish security. The Magistrate's judgement is a long one and contains a most interesting exposition of the circumstances which led up to the institution of the present proceeding

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and of the existing state of parties and of public feeling in the town of Najibabad. I have found it a little difficult, however, to disentangle from this general exposition of the facts the precise findings on the strength of which the order requiring the applicants to furnish security has been passed. What the law requires to justify this order is a finding that these applicants were likely to commit a breach of the peace or disturb the public tranquillity, or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity. These provisions have been interpreted by this Court in a number of rulings, beginning with the elaborate exposition of the law to be found in the case of *Queen Empress* v. *Abdul Qadir* (1). Of later cases the one most in point is in my opinion that of *Jagat Narain* v. *King-Emperor* (2). It is not enough for the District Magistrate to record his opinion that, unless these persons are bound over to keep the peace, there is likely to be a breach of the peace or disturbance of the public tranquillity. He has to find in respect of each and all of these persons that they are likely to commit a breach of the peace or disturb the public tranquillity, or that they are likely to do some wrongful act which may occasion such a disturbance.

The point essentially in issue admits of being briefly stated. The Hindus of the town of Najibabad had expressed a desire to take the Dasehra procession along a route which appeared to the local authorities a highly objectionable one. The District Magistrate has evidently come to the conclusion that this desire on the part of the Hindu community of Najibabad, or on the part of some members of that community, is perverse and provocative. To put the matter bluntly, he obviously thinks that no Hindu can have any desire to take the Dasehra procession along that particular route except for the purposes of irritating and provoking his Muhammadan fellow citizens. He finds it proved as against all these applicants that they have been working in various ways in order to secure for the community of which they are members a recognition of their right to take the Dasehra procession along this particular route. He argues that they are, therefore, likely to do something which will occasion a breach

(1) (1886) I. L. R., 9 All., 452. (2) (1910) 7 A. L. J., 1161.

of the peace or disturb the public tranquillity. The position taken up by the applicants in arguing their case before me seems to be substantially that which was taken up by them in the Magistrate's court. I am not satisfied that it has been properly appreciated or considered by the Magistrate. The applicants contend that they themselves and the members of their community are entitled, in the lawful exercise of their religion and of their rights as citizens of the town of Najibabad, to take the procession down this particular route. They desire to contend that, if any breach of the peace results from their doing so, the blame would not lie on them, but on any other residents of the town of Najibabad who may take it on themselves to use force in order to interfere with persons exercising their lawful rights. They desire to persuade the authorities responsible for keeping the peace in the town of Najibabad that this view is the correct one. However mistaken this view may prove to be, if it is held in good faith, the persons so holding it are entitled to combine together for the purpose of pressing it on the notice of the authorities. The question to my mind is whether the evidence on this record justifies the conclusion that the present applicants, either as members of the Hindu community of the town of Najibabad, or as persons entitled by custom to take a particular part in the annual Dasehra procession, have done anything more than what has been suggested above. Is it correct to say that it is proved in respect of these persons that they are likely themselves to commit a breach of the peace, themselves to disturb the public tranquillity, or to do any wrongful act which may occasion such breach of the peace or disturbance? Indeed, I may put this point even more strongly, and ask myself whether, apart from any question as to the effect of the evidence on the record, there has been any finding by the District Magistrate himself which goes so far as this against the petitioners. The District Magistrate has discussed the proceedings of the Hindu committee in Najibabad to which the majority of these applicants belong. If that committee is a seditious or illegal association it ought to be proceeded against under the ordinary law. The evidence on this record would not justify a finding that the mere fact of membership of that committee would be sufficient to render any

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person liable to be bound over to keep the peace, nor do I understand that the District Magistrate wishes to arrive at any such finding. The essential finding at which the District Magistrate has arrived seems to be embodied in the following words in his judgement:—"They (i.e., the petitioners) wish to get what they want for the future, and with this idea they have instituted a committee which collects funds in order to obtain the object they failed in last year. The attainment of this object would inevitably mean a breach of the peace between Hindus and Muhammadans." I think the District Magistrate might have paused to ask himself more definitely what the "object" above referred to was. It does not seem a sufficient answer to this question to say that the object was that the Dasehra procession might be taken down a particular route. Was the object of the petitioners to take the Dasehra procession, or to cause it to be taken, down that particular route, forcibly and in defiance of any prohibition which might be issued by the authorities; or was it to obtain the recognition by the authorities of their claim to be entitled to follow that route, and so to take the procession along the same with the sanction and under the protection of the authorities? In the former case the applicants have been rightly bound over to keep the peace, in the latter case they have not. Now it does not seem to me that the District Magistrate has come to a finding that, if these applicants were not restrained by an order binding them over to keep the peace, they would be likely to take the Dasehra procession, or to cause it to be taken, down this particular route without the permission of the authorities, or in defiance of any prohibition which the local authorities might issue. Indeed the expression about obtaining "the object failed in last year" suggests a contrary conclusion. What was the object in which the petitioners are alleged to have failed in the previous year? So far as I can gather it was in an attempt to persuade the authorities to permit them to use this route and to enforce, as against any person who might desire to contest the same, the petitioners' alleged right to do so. That the object in question at last year's Dasehra festival was not to take the procession by this route forcibly, and in defiance of the wishes of the authorities seems to be a matter of fair inference from the fact that, when

the local authorities refused such permission, no attempt was actually made to take the procession by the objectionable route. Those members of the Hindu community who were dissatisfied with the decision of the authorities in the matter no doubt protested against the same, and appealed to superior authority; but it does not seem that they made any attempt to override that decision by criminal force. There is no doubt another passage in the District Magistrate's judgement which, if it stood alone, might suggest a different conclusion and an intention on his part to hold that, if securities were not taken from these applicants, there might be an attempt, as he puts it, "to force the route which was refused last year." This expression, however, seems to me difficult to reconcile with other passage in the same judgement. Moreover, it is not as it stands a sufficient finding of fact to justify the order complained of. It is too vague. It only expresses an apprehension on the Magistrate's part that an attempt might be made by some person or persons unspecified. To justify the order which has been passed in this case, I should require a clear finding, resting upon reasonable evidence, that these applicants, if not bound over to keep the peace, would have been likely to employ force, or to incite other persons to employ force, in order to take the Dasehra procession along the objectionable route without the permission of the local authorities, and in defiance of any prohibition which those authorities might see fit to issue. It does not seem to me that there has been any such clear finding against the applicants in the present case. For these reasons I accept this petition of revision. I set aside the order complained of and direct that the security bonds furnished by these applicants be discharged. If the applicants, or any of them, have failed to furnish the required security they should be released from confinement.

Order set aside.

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Order set aside.

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October, 22.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

MASIH-UD-DIN (DEFENDANT) *v.* IMTIAZ-UN-NISSA BIBI (PLAINTIFF).*

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 62—Limitation—Suit for money had and received—Suit by heir to recover share of inheritance from person appointed to wind up estate.

Where, pending arbitration in respect of the distribution of the estate of a deceased person amongst his heirs, the estate was by their consent put in charge of a third party who was to realize the assets and pay the debts, it was *held* that a suit by one of the heirs to recover from such person her share by inheritance was a suit for "money had and received" and was governed by article 62 of the first schedule to the Indian Limitation Act, 1908.

THE facts of this case were as follows :—

The plaintiff, who was the sister of one Gulzar Ali, sued to recover her share in the estate of her brother, who died on the 22nd of August, 1907. The deceased carried on business as a timber merchant. After his death pending disputes, (which it was hoped would be settled by arbitration between the relatives of the deceased), defendant No. 2, Maulvi Syed Masih-ud-din, was appointed to sell the stock-in-trade of the deceased, to realise debts due to him and pay debts due to others by the deceased. The arbitration proceedings seem to have come to nothing ; but it is admitted that the defendant No. 2, the appellant in the present appeal, did realize the estate of the deceased to the extent of Rs. 26,628-12-0. The last item realized by the defendant was in 1908. The plaintiff brought this suit in 1912 for recovery of her share. The court below decreed the suit.

The defendant appealed to the High Court.

The Hon'ble Pandit *Moti Lal Nehru*, Mr. *S. A. Haidar*, Dr. *S. M. Sulaiman*, Babu *Durga Charan Banerji* and Maulvi *Muhammad Ishaq*, for the appellant.

Mr. *B. E. O'Conor*, for the respondent.

RICHARDS, C. J., and BANERJI, J.—This appeal is connected with First Appeal No. 104 of 1912 in which we have just now delivered judgement. The facts are stated in our judgement in the

* First Appeal No. 49 of 1913 from a decree of Guru Prasad Dubey, Subordinate Judge of Allahabad, dated the 12th of December, 1912.

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defendants Ram Singh and Himanchal Singh from their holding. The defendants pleaded that they were in possession of the holding under an unexpired lease, in proof of which they produced a kabuliat accepted and a lease granted by the plaintiffs' agent. The plaintiffs replied that the agent had no authority to grant a lease for ten years, which was the term of that set up by the defendants. The Court of Revenue tried the question of the validity of the lease thus raised, and, deciding it in favour of the defendants, dismissed the suit, and this decision was affirmed by the Commissioner on appeal. The plaintiffs then instituted the present suit in the court of a Munsif, in which they asked for a declaration that the lease was granted without authority and was not binding on them. The Munsif held that the decision of the Court of Revenue was no bar to the trial by a civil court of the suit before him and gave the plaintiffs the decree prayed for, and this decision was affirmed in appeal by the Additional District Judge of Aligarh. The defendant Ram Singh appealed to the High Court. The appeal was laid before a Division Bench the Judges of which were divided in opinion, one being for dismissing the appeal, the other holding that the suit was barred under section 167 of the Agra Tenancy Act, 1901. The appeal was accordingly dismissed. Ram Singh thereupon filed the present appeal under section 10 of the Letters Patent.

Mr. *M. L. Agarwala* for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondents.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit in which the plaintiff sought a declaration that a certain lease and kabuliat were not binding upon him on the ground that they had been granted by a karinda who had no authority. The material facts are as follows:—The plaintiff sued in the first instance in the Revenue Court to eject the defendant appellant. The allegation was that the defendant was a non-occupancy tenant from year to year. The defendant set up the lease and kabuliat. The plaintiff replied that the lease was given without authority. The Revenue Court went into the matter and decided that there was authority to create the tenancy and accordingly dismissed the plaintiff's suit. Thereupon the plaintiff instituted the present suit, claiming the relief we have already mentioned.

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connected appeal, and the only difference between the cases is that a plea of limitation has been taken in the present case. It is contended on behalf of the defendant that the suit is barred by article 62 of the first schedule to the Limitation Act in so far as the case relates to a claim against him for money realized by him. In our opinion under the circumstances of the present case the plaintiff was only entitled to recover under the form of action known as a claim for "money had and received by the defendant for the use of the plaintiff." The last item realized by the defendant was realized as far back as the year 1908. The present suit was not instituted until February, 1912, that is to say, more than three years after the latest item was received. In our opinion the suit is barred under article 62. We accordingly allow the appeal, set aside the decree of the court below, and dismiss the suit, as against the appellant, with costs.

Appeal allowed.

1914
October, 24.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

RAM SINGH (DEFENDANT) v. GIRRAJ SINGH (PLAINTIFF) AND HIMANCHAL SINGH (DEFENDANT)*

Act (Local) No. II of 1901 (Agra Tenancy Act), sections 95 and 167—Jurisdiction—Civil and Revenue Courts—Suit for ejectment of tenant—Decision of incidental question by Revenue Court—Suit in Civil Court with the object of defeating the Revenue Court's decree—Res judicata.

In a suit for ejectment of a tenant filed in a Court of Revenue the defendants pleaded that they held under an unexpired lease granted by the plaintiff's karinda. The plaintiffs replied that the karinda had no authority to grant the lease. The Court of Revenue decided the issue thus raised in favour of the defendants and dismissed the suit. The plaintiffs then sued in a Civil Court asking for a declaration that the lease was without authority and was not binding on them.

Held that the suit would not lie. The Court of Revenue, in a suit the main object of which was the ejectment of the defendants, had jurisdiction to decide the question of the validity of the lease, and the suit was barred by the operation of sections 95 and 167 of the Agra Tenancy Act, 1901. *Gomti Kunwar* v. *Gudri* (1) distinguished. *Rai Krishn Chand* v. *Mahadeo Singh* (2) referred to.

THE plaintiffs in this case, who were zamindars of a village of the Bulandshahr district, sued in a Court of Revenue to eject the

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* Appeal No. 28 of 1914 under section 10 of the Letters Patent.

(1) (1902) I. L. R., 25 All., 138. (2) Weekly Notes, 1901, p. 49.

is argued on behalf of the plaintiff that the present suit could not have been brought in the Revenue Court and that therefore the matter cannot be said to be *res judicata*. On the other hand, the defendant relies on sections 95 and 167 of the Tenancy Act, II of 1901. Section 95 provides that a suit can be brought either by the tenant or the landholder for a declaration of various matters connected with the tenancy, and, amongst others, for a declaration as to the "class" to which the tenant belongs. Section 167 is as follows:—"All suits and applications of the nature specified in the fourth schedule shall be heard and determined by the Revenue Court, and, except in the way of appeal as hereinafter provided, no court other than a Revenue Court shall take cognizance of any dispute or matter in respect of which any such suit or application might be brought or made."

The defendant contends that the plaintiff might have sued under the provisions of section 95 for a declaration that defendant was a non-occupancy tenant and that in such a suit it would have been competent for the Revenue Court to have taken into consideration the question of validity or invalidity of the lease. The defendant futher contends that the real "dispute" between the plaintiff and the defendant was whether or not the defendant was liable to be ejected from his holding on the ground that he was a tenant from year to year, and this is one of the suits or matters referred to in section 167.

It is necessary for a moment to consider what is the *real* relief which the plaintiffs seek. It is clear that what they want is to eject the defendant from his holding. The declaration of the Civil Court on the question of the validity or invalidity of the lease would be quite useless except for the purpose of obtaining possession of the holding from the defendant. It is quite true that if we regard the *form of the suit* and disregard the *substance* of the dispute between the parties, the present suit is not a suit which could have been instituted in the Revenue Court. But the real substance of the matter is clearly a matter which would have been, and was decided in the Revenue Court. It cannot be denied for one moment that the present suit is an attempt to get behind the decision of the Revenue Court. We think that the real test of the matter is whether or not the Revenue Court in a suit for

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ejectment was competent to go into the question of the validity or invalidity of the lease. We can see no reason whatever why it should not do so. If the lease was granted by a person who had no authority to make it, it was simply a piece of waste paper and had no more validity than if it had been forged. In our opinion it is impossible to argue that Revenue Court in the proceedings before it was not entitled to go into the question of the validity or invalidity of the lease.

The learned advocate on behalf of the respondents cited the case of *Gomti Kunwar* v. *Gudri* (1). This case is no authority for the proposition that where in the Revenue Court in a suit for ejectment the defendant pleads that he holds under a lease, it is not competent for the Revenue Court to consider the question of the validity of the lease. The only matter that was decided in that case was whether or not the decision of the Revenue Court operated as *res judicata* in a subsequent proceeding in the Civil Court. The Court held that the matter was not *res judicata* on the ground that the Revenue Court could not have tried the subsequent suit. In that case, (which was no doubt somewhat similar to the case now befores us), the provisions of sections 95 and 167 of the Tenancy Act were not referred to or considered.

In the case of *Rai Krishn Chand* v. *Mahadeo Singh* (2), the principle which we think ought tc apply to the present case is stated in the following words :—" If the second and third defendants executed, in favour of the first defendant, he being a non-occupancy tenant, a lease which they had no power to execute on the landholders' behalf, the proper course for the plaintiff to adopt was to take proper proceedings under the North-Western Provinces Rent Act, 1881, for the ejectment of the tenant, ignoring the lease, and if the lease was set up in defence, showing that under the circumstances of its execution it was not binding upon him. As that course might have been adopted, the provisions of section 95 of Rent Act apply, and the Civil Court could not entertain the suit so far as the setting aside of the lease was concerned."

We allow the appeal, set aside the decree of this Court and also of both the lower courts and dismiss the plaintiff's suit with costs in all courts.

Appeal allowed.

(1) (1902) I. L. R., 25 All., 138. (2) Weekly Notes, 1901, p. 49.

new trustee appointed. We allow the appeal, set aside the decree of the court below and dismiss the plaintiff's suit with costs in both courts. 1914

NIAMAT ALI v. ALI RAZA.

Appeal decreed.

Before Mr. Justice Chamier and Mr. Justice Piggott.

RAS BEHARI LAL (PLAINTIFF) v. AKHAI KUNWAR AND OTHERS (DEFENDANTS.)* 1914 *November* 20.

Act No. V of 1882 (Indian Easements Act), sections 59 and 60—Licence—Revocation—Rights of transferee of property in respect of which a licence has been granted.

Held that the rule laid down by section 59 of the Indian Easedments Act, 1882, is not independent of that laid down by section 60, and does not confer upon the transferee any higher rights than those possessed by the transferor.

THE facts of this case were as follows :—

In the year 1888 one Jhingur Singh, a zamindar, gave unconditionally six plots of land situate in his zamindari to the respondent No. 1 in consideration of medical services rendered to the grandson of Jhingur Singh. The grant was made by means of an unregistered document. The respondent No. 1 entered into possession of the land, constructed buildings and two pacca wells thereon and laid out a garden. He never paid any rent or dues for the land. Jhingur Singh sold his zamindari to the appellant in 1906. The appellant sued in the Revenue Court for assessment of rent on the land granted to respondent No. 1, but his claim was dismissed. Thereupon he brought the present suit in the Civil Court for possession and for damages by way of mesne profits for three years. Both the lower courts dismissed the suit. The plaintiff appealed.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Babu *Purushottam Das Tandon*), for the appellant :—

In the absence of any registered document there could be no transfer of property, and the respondent No. 1 is a mere licensee. The appellant who is a transferee from the grantor is not, under section 59 of the Easements Act, bound by the licence and can revoke it. Section 59 is not controlled by section 60. The latter is not a modification of or proviso to section 59. The Indian Easements Act makes a difference between the grantor of the licence

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* Second Appeal No. 1250 of 1913 from a decree of Sri Lal, District Judge of Ghazipur, dated the 20th of August, 1913, confirming a decree of Muhammad Husain, Subordinate Judge of Ghazipur, dated the 29th of January, 1913.

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himself and a transferee from him, and there is nothing to prevent a transferee from revoking the licence under section 59. The transferee is not bound to continue the licence granted by the former owner; *Sundrabai* v. *Jayawant* (1). A licence, unless it is coupled with the grant of an interest in land, is revocable at any time, although the licence may have been granted for a valuable consideration; *Wood* v. *Leadbitter* (2). In any case the defendant should pay damages for use and occupation.

Mr. *B. E. O' Conor*, for the respondents :—

The licence cannot be revoked. Section 60 (*b*) protects the respondents. The original grantor could not revoke the licence and eject the licensee, who at considerable expense has erected constructions of a permanent character. A transferee from him can have no higher rights. No one can convey any higher title than what he himself has. All that section 59 says is that a transferee "as such" will not be bound by a licence granted by the transferor. He will be bound by the licence, as the licensee has long before the transfer executed works of a permanent character at his own expense.

The Hon'ble Dr. *Tej Bahadur Sapru*, in reply :—

This is not a case of a defective title; there was no flaw in the grantor's title, so no question arises as to whether he could convey to his transferee a better title than what he had himself. "As such" in section 59 means "unless he has by some act of his debarred himself from revoking it"; e.g. by encouraging the licensee to execute works of a permanent character at his own expense.

CHAMIER and PIGGOTT, JJ.—The facts of the case are that in the year 1888 one Jhingur Singh made over to the first defendant, in consideration of medical services rendered by him, some plots of land in a village. The defendant entered into possession, planted a garden and built houses on the land, laying out a considerable sum of money thereon. In 1906 Jhingur Singh sold his rights in the village to the plaintiff appellant, who at once set to work to compel the first defendant to pay rent for the land. All his attempts in the Revenue Court failed and he then brought this suit praying for proprietary possession of the land and for mesne profits for three years immediately preceding the suit.

(1) (1898) I. L. R., 23 Bom., 397 (400). (2) (1845) 13 M. and W., 838.

The defence was that the plots in question were given by the zamindar to the defendant in recognition of his medical services, that the defendant had spent a large sum of money on the land and that the plaintiff had no right to dipossess him. The courts below have agreed in dismissing the plaintiff's claim. In second appeal it is contended on behalf of the plaintiff that in the absence of a registered document the defendant is no more than a licensee and that the plaintiff being a transferee of the property is entitled to revoke the licence. Reliance is placed on section 59 of Easements Act, which runs as follows :—

"When the grantor of a licence transfers the property affected thereby, the transferee is not as such bound by the licence."

The defendant, on the other hand, relies on section 60 of the Act, which, so far as it applies to the present case, is as follows :—

"A licence may be revoked by the grantor unless (*b*), the licensee, acting upon the licence, has executed a work of permanant character and incurred expenses in the execution."

The plaintiff admits that on the facts found the case is clearly covered by section 60 of the Act; but he maintains that section 59 lays down an independent rule which entitles a transferee of property to revoke a licence, even if the licensee acting upon the licence has executed a work of a permanent character and incurred expenses in the execution, that is to say, even if the licence could not have been revoked by the original grantor. It seems to us that the words, "as such" in section 59 are extremely significant and would not have appeared in the section if the intention had been to lay down an independent rule that a transferee of property might revoke a licence which could not have been revoked by the transferor The section was probably inserted in order to meet the possibility of a plea by the licensee of property that no one but the grantor of the licence is entitled to revoke it and that if the grantor does not revoke it his transferee cannot do so. In our opinion section 59 means that, when the grantor of a licence transfers the property, the transferee is no more bound by the licence than the transferor was, and we think it impossible to construe this section as meaning that the transferee has a better right than the transferor. For these reasons we are of

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opinion that section 59 of the Easements Act does not entitle the plaintiff to revoke the licence granted to the defendant, even if he is only a licensee. We need only add that the plaintiff's claim, against the defendant as a trespasser, is clearly not maintainable. The suit was rightly dismissed. We dismiss this appeal with costs.

Appeal dismissed.

1914
November, 21.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Parmada Charan Bannerji.

SURAJ MAL (PLAINTIFF) *v.* HIRA KUNWAR (DEFENDANT.) *

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 199—*Suit for ejectment—Plea that defendant was holding under an unexpired lease—Question of proprietary title.*

In a suit for ejectment in a Court of Revenue the defendant pleaded that he was entitled to remain in possession under a certain *zar-i-peshgi* lease the term of which had not expired The Court of Revenue treated the question thus raised as falling under section 199 of the Agra Tenancy Act, 1901, and directed the defendant to file a suit in the Civil Court within three months to vindicate his right. *Held* that section 199 was not applicable and the defendant was not bound to file his suit in the Civil Court within three months from the date of the order of the Court of Revenue.

THE facts of this case were as follows :—

The defendant and Behari Lal, father of the plaintiff, were co-sharers in a village. Behari Lal, who managed the property, gave certain land on *zar-i-peshgi* lease to the plaintiff. After the lease the defendant applied for and obtained partition of the village and thereafter brought a suit in the Revenue Court for ejectment of the plaintiff from the plots allotted to him on the ground that the lease was a fraudulent lease. The plaintiff set up his right under the lease. The Revenue Court acting under section 199 of the Agra Tenancy Act directed the plaintiff to file a suit in the Civil Court within three months for a declaration of his right. The plaintiff preferred an appeal to the Commissioner against the order of the Assistant Collector and a further appeal to the Board of Revenue against the order of the Commissioner. It was held that the order of the Assistant Collector was a final order and no appeal lay to those courts. During the

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* Second Appeal No. 32 of 1914, from a decree of A. Sabonadiere, District Judge of Aligarh, dated the 2nd of October, 1913, confirming a decree of Lalta Prasad Johri, Munsif of Haveli, dated he 28th of July, 1913.

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so fallen to her lot and for ejectment of the plaintiff. The plaintiff set up the document of the 9th of September, 1904. The Revenue Court thinking that it was a case to which section 199 of the Agra Tenancy Act applied, directed Suraj Mal to institute a suit in the Civil Court within three months to establish his rights under the lease. Suraj Mal did not institute a suit within the three months prescribed. Both courts have dismissed the suit on the ground of limitation, holding that the suit ought to have been instituted within the three months mentioned in the order of the Revenue Court. Hence the present appeal.

It seems to us open to some doubt whether Musammat Hira Kunwar was entitled to institute her suit in the Revenue Court for ejectment. Her case appears to be that the lease of the 9th of September, 1904, was a fraudulent lease made by the lambardar in favour of his own son. If this be her case, and if it be found to be correct, then Suraj Mal would be a trespasser. It seems to us also that the decision of the courts below was not correct. It is quite clear that no question of "proprietary" title was raised in the Revenue Court. The plaintiff in that court sued for possession of certain plots and Suraj Mal set up the plea that she was not entitled to possession, because a lease had been made in his favour by the lambardar. If the suit was properly instituted in the Revenue Court, then the Revenue Court might have decided the question of the validity or the invalidity of the lease itself. But it seems to us that, a cloud having been cast on Suraj Mal's title under his lease, he was entitled to institute the present suit notwithstanding that the period prescribed in the order of the Revenue Court had expired. We particularly wish to state that we are not expressing any opinion on the question of the validity or invalidity of the lease. This is a matter which must be tried. We accordingly allow the appeal, set aside the decrees of both the courts below, and remand the case to the court of first instance, through the lower appellate court, with directions to re-admit the case under its original number in the file and proceed to hear and determine the same according to law. We direct that the court below take up the case as soon as possible. Costs here and heretofore will be costs in the cause.

Appeal allowed and cause remanded.

time that the plaintiff was carrying on these fruitless appeals the time given under section 199 of the Agra Tenancy Act expired. The defendant did file a suit in the Civil Court, but it was dismissed by both the courts below on the ground of limitation, the appellate Court holding that the plaintiff could not get the benefit of section 14 of the Limitation Act. The plaintiff (defendant before the Court of Revenue) appealed to the High Court.

Munshi *Gulzari Lal*, for the appellant :—

The plaintiff did not set up a proprietary right. He had set up a right under the lease, that is, he claimed to be a tenant of the whole co-parcenary body. The Revenue Court could not, therefore, make any order under section 199 of the Agra Tenancy Act. The order was *ultra vires*. This was a suit for declaration and could be brought within six years of the accrual of the cause of action and the courts below were wrong in dismissing it as barred by limitation.

Dr. *Satish Chandra Banerji*, for the respondent :—

The plaintiff claimed to be a usufructuary mortgagee and that was raising a question of proprietary title. The Revenue Court had, therefore, power to refer him to the Civil Court. The suit should have been brought within the time allowed by law. It is now barred by limitation. Even if the plaintiff was a non-occupancy tenant for a certain term within the meaning of section 19 of the Agra Tenancy Act no suit lay in a Civil Court for declaration of right. Reference was made to sections 95 and 67 of the Tenancy Act. In any case the suit should fail.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit in which the plaintiff sought a declaration that he was entitled to remain in possession of certain property under an alleged *zar-i-peshgi* lease, dated the 9th of September, 1904. It appears that the document in question was executed by one Lala Behari Lal, the father of the plaintiff, in favour of his son. Musammat Hira Kunwar, the defendant, was one of the co-sharers. Partition proceedings were brought in the Revenue Court and a portion of the property alleged to have been leased fell to the lot of Musammat Hira Kunwar. Thereupon she instituted a suit in the Revenue Court for possession of the plots that had

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so fallen to her lot and for ejectment of the plaintiff. The plaintiff set up the document of the 9th of September, 1904. The Revenue Court thinking that it was a case to which section 199 of the Agra Tenancy Act applied, directed Suraj Mal to institute a suit in the Civil Court within three months to establish his rights under the lease. Suraj Mal did not institute a suit within the three months prescribed. Both courts have dismissed the suit on the ground of limitation, holding that the suit ought to have been instituted within the three months mentioned in the order of the Revenue Court. Hence the present appeal.

It seems to us open to some doubt whether Musammat Hira Kunwar was entitled to institute her suit in the Revenue Court for ejectment. Her case appears to be that the lease of the 9th of September, 1904, was a fraudulent lease made by the lambardar in favour of his own son. If this be her case, and if it be found to be correct, then Suraj Mal would be a trespasser. It seems to us also that the decision of the courts below was not correct.

maintenance payable to her. The Revenue Court being doubtful whether it has jurisdiction to entertain the application has referred this case to this Court under section 195 of the Tenancy Act. The award, which is incorporated in the decree of this Court, provides that if the maintenance due to Anupa Kunwar is not paid she may enforce payment by taking proceedings in a competent court *(ba-charajoi adalat majaz hasb zabta)*. It seems to us that the persons who drew up the award knew that there would be difficulty in executing a decree for maintenance in a Revenue Court and therefore, instead of providing that enforcement of the decree should be by proceedings in the execution department, they provided that Anupa Kunwar should take proceedings in a competent court. We regard this portion of the decree as merely declaratory of Anupa Kunwar's rights to receive maintenance. In our opinion she should bring a regular suit in the Civil Court to enforce her right to maintenance. Section 195, sub-section (3) of the Tenancy Act provides "on any such reference being made the High Court may order the court either to proceed with the case, or to return the plaint, application or appeal for presentation to such other court as it may declare to be competent to try the same." It seems to us that we should not take either of these courses. In our opinion the application for execution should be dismissed. With this expression of opinion we direct that the papers be returned to the court which has made this reference.

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ANUPA KUNWAR *v.* ACHHAIBAR SINGH.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1914 *November, 23.*

BALDEO SAHAI (PLAINTIFF) *v.* BEHARI LAL AND OTHERS (DEFENDANTS)*

Promissory note—Suit by assignee of promissory note against executants—Payment of consideration by assignee irrelevant.

Held that in a suit by the assignee of a promissory note against the executants the latter are not concerned with the question whether the assignment was for consideration or not. All that they are entitled to have ascertained is that the plaintiff is the legal holder of the note and able to give them a good discharge.

* Second Appeal No. 1540 of 1913 from a decree of Mubarak Husain, Subordinate Judge of Meerut, dated the 17th of June, 1913, reversing a decree of Lal Gopal Mukerji, Munsif of Meerut, dated the 27th of February, 1913.

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BALDEO SAHAI v. BEHARI LAL.

THIS was a suit for recovery of money on a promissory note executed by defendants 1 and 2 in favour of defendant 3. Defendant No. 3 assigned it to the plaintiff, who brought this suit. The first two defendants pleaded want of consideration and want of title in defendant No. 3. The courts below found these facts in favour of the plaintiff. The appellate court, however, dismissed the suit on the ground that the plaintiff had paid no consideration to the 3rd defendant. The plaintiff appealed to the High Court.

Dr. *Satish Chandra Banerji*, for the appellant.

Babu *Sital Prasad Ghose*, for the respondent, cited *Kashi Das* v. *Chaithan* (1) and *Baldeo Sahai* v. *Harbans* (2).

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit in which the plaintiff sought to recover the amount due under a promissory note. A number of pleas were taken, and amongst others a denial of consideration. The court of first instance granted the plaintiff a decree. The lower appellate court reversed the decision of the court of first instance and dismissed the plaintiff's suit. Both courts have found that there was good consideration for the note. But the lower appellate court has held that the plaintiff, who is the holder of the note under an assignment, dated the 17th of June, 1912, did not give any consideration for the assignment of the note. It seems to us that this finding was immaterial. Even if we assume the finding to be correct, the defendants, Behari Lal and Nathu Singh, have no concern with the question whether consideration was paid or not paid by the assignee of the note. If they are liable under the note all that they are entitled to have ascertained is that the plaintiff is the legal holder of the note and able to give them a good discharge. It is quite clear that the plaintiff is entitled to give a discharge to the defendants. The case cited has no application to the present case. In that case the transferor was a party to the suit and he repudiated the transfer in favour of the plaintiff, contending that he had retained all his original rights. We must allow the appeal and setting aside the decree of the court below, restore the decree of the court of first instance. The appellant will have his costs in this Court and in the court below.

Appeal allowed.

(1) (1913) 23 Indian Cases, 813. (2) (1911) I. L. R., 33 All., 626.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1914
November, 25

KASHI RAM AND OTHERS (PLAINTIFFS) *v.* HET SINGH AND OTHERS (DEFENDANTS.)*

Act No. IV of 1882 (Transfer of Property Act), section 82—Mortgage—Contribution—Charge.

In the year 1880, one Tikam Singh, who with several sons constituted a joint Hindu family, executed a mortgage of a village forming part of the joint family property. In 1889, he, with five of his sons, executed a second mortgage of the same village. In 1891, he, with two of his sons, executed a third mortgage of the same village. Tikam Singh died and the sons partitioned the village amongst them into several mahals. The first mortgagee brought a suit for sale on his mortgage, and having obtained a decree brought to sale the share of Het Singh, one of the brothers, and the mortgage was discharged. Thereafter Het Singh brought a suit for contribution and obtained a decree. After the satisfaction in this manner of the mortgage of 1880, the other brothers discharged the later mortgages of 1889 and 1891 and then brought the present suit for contribution against Het Singh.

Held that in these circumstances the plaintiffs were not entitled to a decree against Het Singh. *Har Prasad* v. *Raghunandan Prasad* (1) referred to.

THE facts of this case were as follows :—

One Tikam Singh executed a mortgage of the village Kakna in 1880. In 1889, the same village was mortgaged under a mortgage which was executed by Tikam Singh and his five sons. In 1891, Tikam Singh and two of his sons again mortgaged the same property. The mortgagee, under the mortgage of 1880, brought a suit after the death of Tikam Singh and obtained a decree. In the meantime the six sons of Tikam Singh had divided the village between themselves. The decree-holder executed the decree against one of the sons (Het Singh) and sold his share. Thereafter the other sons paid up the mortgages of 1889 and 1891. Het Singh brought a suit for contribution, after discharge of the decree on the mortgage of 1880, against his brothers. Some of the defendants, Kashi Ram and Tota Ram, in their defence, set up a plea that they had discharged the mortgages of 1889 and 1891 and the plaintiff was liable to pay his share. They did not substantiate this plea and the suit was decreed. The present suit for contribution was brought by the defendants to that suit.

* Second Appeal No. 1241 of 1913, from a decree of D. R. Lyle, District Judge of Agra, dated the 14th of August, 1913, modifying a decree of Bans Gopal, Additional Subordinate Judge of Agra, dated the 7th of December, 1912.

(1) (1908) I. L. R., 31 All., 166.

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KASHI RAM v. HET SINGH.

The court below held that the suit of the plaintiffs who were parties to Het Singh's suit or their representatives was barred by *res judicata*. The plaintiffs appealed to the High Court.

Pandit *Sham Krishna Dar*, for the appellants :—

The mortgages of 1889 and 1891 were payable on demand, but were discharged in 1910. The personal liability of the mortgagors had come to an end by that time. The property was, however, liable. The defendants to the suit brought by Het Singh were not bound to raise the question which they now allege. As a matter of fact the plea was raised, but it was not substantiated. As the defendants were not bound to raise it they can raise it now. In that suit they could not claim a set-off, but only could bring a counter claim for a declaration of their charge on Het Singh's property. The charge was only a statutory charge. The claim is not barred by *res judicata*. There are three mortgages. Het Singh paid up the first and so paid more than his share, and he realized the excess from other mortgagors. His property having been sold, if he is allowed to escape from liability to pay other mortgages it would not be equitable. If instead of a decree for contribution he were to get a share from the shares of the other brothers that share would be liable. Here he has got a decree instead of that share and that decree should be made liable.

Babu *Durga Charan Banerji*, for the respondents :—

In Het Singh's suit they had as a matter of fact set up the mortgages of 1889 and 1891 : and the issue was raised and decision was given on it. The matter cannot be raised in the present suit. It was a case in which the question might and ought to have been raised but was not raised. The issue was not irrelevant in that suit. The plaintiffs had paid some money part of which the defendant was liable to pay. They alleged that they were entitled to contribution as against the defendants. The question was decided against them. The second question is whether under their own plaint they are entitled to any relief. They claim a charge against the decree obtained by Het Singh. The charge of Het Singh was created on payment of a prior mortgage. That gave him priority, for he stepped into the shoes of the prior mortgagee. He is not liable to pay up the subsequent mortgages. The question under section 82 of the Transfer

of Property Act, is whether the decree which Het Singh obtained has been relieved so as to give rise to a claim for contribution. A mortgagor, who sells the mortgaged property subject to the mortgage and is subsequently compelled to pay the debt, is subrogated to the rights of the mortgagee. One of the mortgagors here has paid off the prior mortgage. The effect of that is that he has redeemed it. The mortgagor who redeems the entire mortgage steps into the shoes of the mortgagee; Ghose on Mortgage, pp. 347; 348, Jones on Mortgage, Vol. I, 817; *Har Prasad* v. *Raghunandan Prasad* (1).

Pandit *Sham Krishna Dar*, was heard in reply.

RICHARDS, C. J., and BANERJI, J.—The facts connected with the suit out of which this appeal arises are a little complicated, but they nevertheless may very shortly be stated. Tikam Singh made a mortgage in the year 1880 of a village called Kakna. A second mortgage was made in the year 1889 by the same Tikam Singh and five of his sons. A third mortgage was made in the year 1891 by the same Tikam Singh and two of his sons. The village was at that time joint family property. Subsequently the sons of Tikam Singh divided the village into a number of mahals. The mortgagee under the mortgage of 1880 brought a suit against Het Singh, one of the sons, with the result that his mahal was sold and the mortgage discharged. Het Singh brought a suit against his brothers and their children claiming contribution under section 82 of the Transfer of Property Act and obtained a decree. In the meantime, however, the plaintiffs had discharged the two later mortgages and they brought the present suit claiming that they also had a charge under section 82. It was useless to them to claim any charge against the mahal which had belonged to Het Singh, because that mahal had been sold in discharge of the first mortgage. A number of questions were gone into in the court below which, it appears to us, were not very relevant. The court of first instance granted the plaintiffs a decree. The lower appellate court modified the decree of the court of first instance by dismissing the suit of some of the plaintiffs, on the ground that they pleaded their claim as a set-off to the suit brought by Het Singh; that such plea was decided against them, and that accordingly

(1) (1908) I. L. R., 31 All., 166.

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on the principle of *res judicata* they could not now set up a claim which was disposed of in the previous litigation. Had it been necessary to decide the point, we doubt very much that we would have agreed with the lower appellate court on this question of set-off. It seems to us very doubtful whether under the circumstances of the present case the claim of the plaintiffs could have been "set off" against the claim of Het Singh in the previous litigation. In the view we take of the case, however, it is unnecessary to decide this point. It seems to us that the only question which it is necessary to decide is the question of the priority of the charge of Het Singh. The mortgage of 1880 was not discharged until the 20th of April, 1907. If Het Singh's charge is to take priority as of this date, then it would appear to us that the plaintiffs would be entitled to make the "interest" of the defendants, i.e., their charge, contribute rateably to the discharge of the two mortgages of 1889 and 1891. On the other hand, if Het Singh's charge takes priority from the date of the mortgage of 1880 then the plaintiffs are not entitled to any charges under section 82 of the Transfer of Property Act. The very question seems to have arisen in the case of *Har Prasad* v. *Raghunandan Prasad* (1). At page 168 of the judgement there is the following passage:—

"The next question is whether this charge can take priority over the plaintiff's mortgage. No doubt the charge came into existence when the mortgage was paid off, but as the person who acquired the charge had discharged a prior mortgage, he acquired, we think, priority over an intermediate puisne mortgagee. There can be no doubt that a subsequent mortgagee, or the purchaser of the equity of redemption, who pays off a prior mortgage, acquires, on equitable grounds, priority over a puisne mortgagee. On the principle of subrogation he is substituted for the prior mortgagee and acquires the rights of such mortgagee and the benefit of the securities held by him. We fail to see any difference in principle between the case of a subsequent mortgagee or purchaser of the equity of redemption and that of a co-mortgagor who satisfies a prior mortgage. Both classes of persons relieve another and his property of the liability which attaches to them and the same principles of justice and equity which apply to the one class equally apply to the other."

Applying this principle to the present case, it would appear that the plaintiff's position cannot be placed higher than that of standing in the shoes of the mortgagees under the mortgages of 1889 and 1891, that is to say, that they are puisne to Het Singh

(1) (1908) I. L. R., 31 All., 166.

and his successors in title, who for the purposes of the present claim stand in the shoes of the mortgagee under the mortgage of 1880 which was discharged by the sale of Het Singh's property. This being so, it is clear that none of the plaintiffs has any right against the person or property of the defendants. The result is that we must dismiss this appeal with costs.

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KASHI RAM v. HET SINGH.

Appeal dismissed.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1914 November, 26.

DAYA SHANKAR (DEFENDANT) v. HUB LAL AND ANOTHER (PLAINTIFFS).*

Registration—Family settlement—Distribution of family property carried out by means of mutation proceedings—Hindu law—Joint Hindu family—Representative capacity of father.

The members of a Hindu family, one of whom was a minor, entered into a compromise concerning the partition of certain property in the course of mutation proceedings, and the partition agreed to was carried into effect by these proceedings.

Held that, inasmuch as the minor was represented by his father and there was no evidence of fraud or collusion, the compromise was binding on him. *Held also, that the compromise did not require registration. Kokla v. Piari Lal* (1) referred to.

THE facts of this case were as follows :—

One Bhajan Lal made a will of certain property in favour of, among others, the plaintiffs. In mutation proceedings the father of the minor plaintiff Raj Narain entered into a settlement with the defendant, who had filed objections to mutation in favour of the plaintiffs being effected, by which the defendant got a share out of the property left to the minor. The minor brought this suit for possession of the entire share given to him under the will. The defence was that the arrangement made was a family settlement and was binding on the minor. The court below held that Bhajan Lal was entitled to give away the property to whomsoever he pleased and the father of the plaintiff could not enter into any settlement on behalf of his minor son. It decreed the suit. The defendant appealed to the High Court.

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*Second Appeal No. 82 of 1914, from a decree of A. Sabonadiere, District Judge of Aligarh, dated the 8th of November, 1913, modifying a decree of Kunwar Sen, Assistant Judge of Aligarh, dated the 16th of May, 1912.

(1) (1913) I.L.R., 35 All., 502.

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Munshi *Gulzari Lal*, for the appellant:—

In the absence of fraud a compromise entered into on behalf of a minor by his father is binding on him. It was found that in this case there was no fraud. The plaintiffs are, therefore, bound by the compromise.

Munshi *Girdhari Lal Agarwala*, for the respondents:—

A compromise was entered into in this case and filed. The consent of the court was not obtained, and it is, therefore, invalid. Further a compromise such as the one made in this case should have been registered; without registration it could not be admitted in evidence; *Bharosa* v. *Sikhdar* (1). There was however a case—*Kokla* v. *Piari Lal* (2)—which did not find favour with the Judge who decided. *Bharosa* v. *Sikhdar*. The case of *Jagrani* v. *Bisheshar* (3) is against the present contention. Here, however, the father could not enter into any settlement, the property not being joint family property. It was the exclusive property of the minor.

Munshi *Gulzari Lal*, was not heard in reply.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit in which the plaintiffs sought a declaration that they were the owners and possessors of certain property and possession.

It appears that the parties, who are disputing about the estate of one Bhajan Lal, were all members of the same family. In mutation proceedings a family settlement was come to, in consequence of which the plaintiffs were recorded as owners in respect of the property now in suit. It is alleged by the plaintiffs that this arrangement was come to as the result of fraud. The court of first instance found that there was no fraud when the family settlement was entered into, and accordingly the plaintiffs were not entitled to a decree.

The lower appellate court agreed in all the findings of fact of the court of first instance, but, finding that one of the plaintiffs was a minor, it decreed the claim to the extent of the interest to which he would have been entitled had there been no family arrangement. The defendant comes here in second appeal contending that inasmuch as the father of the minor Raj Narain consented to the arrangement it is binding upon his son, who is a

(1) (1914) 12 A. L. J., 998. (2) (1913) I. L. R., 35 All., 502.
(3) (1914) 12 A. L. J., 1316.

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member of the joint Hindu family. In our opinion under ordinary circumstances and in the absence of fraud or collusion the managing member of a joint Hindu family is entitled to transact the business of the joint Hindu family and represent the members of it.

In the present case no fraud or misconduct of any kind on the part of the father is proved, and it is not shown that the arrangement taken as a whole was not for the benefit of the family. On this point, therefore, we think that the lower appellate court was wrong.

The respondent, however, seeks to uphold the decree of the court below on the ground that rights in immovable property were created by the compromise entered into between the parties, and that this could only be done by a document duly registered. We think that under the circumstances of the present case it was not necessary that there should have been any registered writing. The case is very similar to the case of *Kokla* v. *Piari Lal* (1). This case was followed in an unreported case to which one of us was a party (2).

We accordingly allow the appeal, set aside the decree of the lower appellate court, and restore the decree of the court of first instance with costs.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Mr Justice Tudball.

EMPEROR *v.* JIWAN *

1914 November, 26

Criminal Procedure Code, section 403—Previous acquittal —"Court of competent jurisdiction"—Sanction.

Where the law requires a previous sanction to be given before a charge can be entertained by a court, that court is not a court of competent jurisdiction until the sanction has been obtained. *In re Samsudin* (3) followed The fact, therefore, that a person has been tried for and acquitted of offences under the Indian Penal Code in respect of certain transactions in connection with the registration of a document is no bar to his trial for an offence under section 82 of the Registration Act arising out of the same transactions.

* Criminal Reference No. 952 of 1914.

(1) (1913) I. L. R., 35 All., 502. (2) Since reported (1914) 12 A. L. J., 1316.

(3) (1898) I.L.R., 22 Bom., 711.

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EMPEROR
v.
JIWAN.

THE facts of this case were as follows :—

One Musammat Jhabbo died. Musammat Mulo forged a lease of certain land in favour of her own sons, signing the name of Musammat Jhabbo thereto. She then went to the Registration office and personating Musammat Jhabbo presented the document for registration. Jiwan Kahar identified her as being Musammat Jhabbo. The document was registered and returned to Musammat Mulo. Musammat Mulo was placed upon her trial and convicted of the offence of forgery. She was also placed upon her trial and convicted of the offence of cheating the Sub-Registrar. Jiwan was placed upon his trial for aiding and abetting forgery. He was acquitted. He was then placed upon his trial for aiding and abetting cheating. He was convicted by the Magistrate, but acquitted on appeal. Thereupon the District Registrar gave sanction for his trial for an offence under section 82 of the Registration Act.

The case was committed for trial to the Sessions Judge, who referred it to the High Court, recommending that the commitment should be quashed, upon the ground that section 403 of the Code of Criminal Procedure was a bar to the trial of Jiwan.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

The accused was not represented.

TUDBALL, J.—This is a reference by the Sessions Judge of Shahjahanpur suggesting that the commitment of one Jiwan Kahar on a charge under section 82 (A) of the Registration Act for trial in his court be quashed. The facts are simple. One Musammat Jhabbo died. Musammat Mulo forged a lease of certain land in favour of her own sons, signing the name of Musammat Jhabbo thereto. She then went to the Registration office and personating Musammat Jhabbo presented the document for registration. Jiwan Kahar identified her as being Musammat Jhabbo. The document was registered and returned to Musammat Mulo. Musammat Mulo was placed upon her trial and convicted of the offence of forgery. She was also placed upon her trial and convicted of the offence of cheating the Sub-Registrar. Jiwan was placed upon his trial for aiding and abetting forgery. He was acquitted. He was then placed upon his trial for aiding and

abetting cheating. He was convicted by the Magistrate, but acquitted on appeal. Thereupon the District Registrar gave sanction for his trial for an offence under section 82 of the Registration Act. The Magistrate has now committed the case for trial, and hence the present reference. The learned Sessions Judge in a long order of reference suggests that under section 403 the man cannot now be tried on the same facts for this offence under the Registration Act, because this was an offence for which he might have been charged (under section 236) of the Code of Criminal Procedure and convicted (under section 237) at his former trial. One point is quite clear, that the former trial and acquittal of Jiwan for the offence of aiding and abetting the forgery is in no way a bar to his trial for an offence under the Registration Act. The question is whether or not his trial and acquittal of the offence of aiding and abetting the cheating is a bar to the present trial. Where the law requires a previous sanction to be given before a charge can be entertained by a court, that court is not a court of competent jurisdiction until the sanction has been obtained. This was held in *In re Samsudin* (1). At the former trial of Jiwan he could not have been charged with or convicted or acquitted of the offence with which he is now charged by reason of the want of sanction. Clause 4 of section 403 lays down that a person acquitted of any offence constituted by any acts may, notwithstanding such acquittal, be subsequently charged with and tried for any other offence constituted by the same acts which he may have committed if the court by which he was first tried was not competent to try the offence with which he is subsequently charged. Therefore, it is clear that Jiwan may now be tried for the offence under section 82 of the Registration Act. I, therefore, cannot accept the reference and order the record to be returned. The Sessions Judge will proceed with the trial. He, no doubt, will take into consideration, if he finds the accused guilty, the fact that the man has already been subjected to two trials and has served a considerable period in jail.

(1) (1896) I. L. R., 23 Bom., 711.

Before Mr. Justice Chamier and Mr. Justice Piggott.

1914
November, 20.

GUR BAKHSH SINGH *v.* KASHI RAM AND ANOTHER*

Criminal Procedure Code, section 537—Act No. XLV of 1865 (Indian Penal Code), sections 182 and 211—Acquittal upon ground of absence of sanction —Practice—Revision—Application by private prosecutor against order of acquittal.

Held that a court of criminal appeal was not justified in setting aside a conviction under section 182 of the Indian Penal Code on the sole ground that the offence, if any, which the appellants had committed was one under section 211 of the Code and that no sanction for a prosecution under that section had been obtained.

In this case under special circumstances the High Court entertained an application in revision presented by a private prosecutor against an order of acquittal.

THE facts of this case were as follows:—

In the course of an inquiry in a case of dacoity a statement was made to the investigating police officer implicating one Gur Bakhsh Singh. It appears that Gur Bakhsh Singh was arrested and remained for some period in custody. He was eventually released by the police officer concerned, on the ground that the investigation did not disclose any evidence warranting his prosecution. Several persons implicated in the same dacoity were prosecuted to conviction. Gur Bakhsh Singh subsequently applied to the Superintendent of Police for sanction to prosecute Kashi Ram and Baldeo for having given false information to the investigating police officer to his injury, and thereby committed an offence punishable under section 182 of the Indian Penal Code. Sanction was given by the Superintendent of Police, and Kashi Ram and Baldeo were prosecuted to conviction in the court of a Magistrate of the first class. They appealed to the Sessions Judge. The learned Sessions Judge formed an opinion that the facts alleged by Gur Bakhsh Singh disclosed the commission of an offence punishable under section 211 of the Indian Penal Code, and presumably also held that, this being the case, it was not legal to prosecute Kashi Ram and Baldeo for the lesser offence. He held that there could be no conviction under section 211 of the Indian Penal Code for want of sanction from the court in which, or in relation to some proceedings in which, the offence, if any, had

*Criminal Revision No. 1027 of 1914, from an order of J. L. Johnston, Sessions Judge of Farrukhabad, dated the 15th of October, 1914.

been committed. He accordingly set aside the conviction and sentence against the appellants before him, without going into the merits of the case or discussing the evidence in any way. An application for revision of this order was filed by Gur Bakhsh Singh.

Mr. *D. R. Sawhny*, for the applicant.

Mr. *E. A. Howard*, for the opposite parties.

CHAMIER and PIGGOTT, JJ.—This is an application for revision filed under somewhat peculiar circumstances. In the course of an inquiry in a case of dacoity a statement was made to the investigating police officer implicating one Gur Bakhsh Singh. It appears that Gur Bakhsh Singh was arrested and remained for some period in custody. He was eventually released by the police officer concerned, on the ground that the investigation did not disclose evidence warranting his prosecution. Several persons implicated in the same dacoity were prosecuted to conviction. Gur Bakhsh Singh subsequently applied to the Superintendent of Police for sanction to prosecute Kashi Ram and Baldeo for having given false information to the investigating police officer to his injury, and thereby committed an offence punishable under section 182 of the Indian Penal Code. Sanction was given by the Superintendent of Police, and Kashi Ram and Baldeo were prosecuted to conviction in the court of a Magistrate of the first class. They appealed to the Sessions Judge. The learned Sessions Judge formed an opinion that the facts alleged by Gur Bakhsh Singh disclosed the commission of an offence punishable under section 211 of the Indian Penal Code, and presumably also held that, this being the case, it was not legal to prosecute Kashi Ram and Baldeo for the lesser offence. He held that there could be no conviction under section 211 of the Indian Penal Code for want of sanction from the court in which, or in relation to some proceedings in which, the offence, if any, had been committed. He accordingly set aside the conviction and sentence against the appellants before him, without going into the merits of the case or discussing the evidence in any way. An application for revision of this order has been filed by Gur Bakhsh Singh and we have entertained it. We treat this case as an exception to the general rule of practice by which this Court declines to entertain

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GUR BAKHSH SINGH v. KASHI RAM.

an application for revision against an order of acquittal presented by a private person.

The complaint made by Gur Bakksh Singh is that Kashi Ram and Baldeo, the persons accused by him, have been acquitted and released without any trial of their appeals on the merits, and in reality without any finding that they either have or have not committed the offence under section 182 of the Indian Penal Code of which they had been convicted by the trying Magistrate. We are both of opinion that the Sessions Judge was not justified in ignoring the provisions of section 537, clause (*b*), of the Code of Criminal Procedure. There had been a conviction by a court of competent jurisdiction, and if there was any question as to sanction, the provisions of section 537 could have met the case. Apart from this, the conviction had actually been obtained in respect of an offence under section 182 of the Indian Penal Code upon a prosecution based on a sanction granted by a competent authority. The Sessions Judge has in fact held that Gur Bakksh Singh was not entitled to institute the prosecution for an offence under section 182 of the Indian Penal Code upon facts which might perhaps also constitute a graver offence punishable by section 211 of the Indian Penal Code. The question of the relation of these two sections *inter se* has been much debated. In the opinion of one of us at any rate, Gur Bakhsh Singh was perfectly entitled to institute a prosecution for the minor offence only, more particularly as it is at least open to doubt whether the facts alleged would constitute an offence under section 211 of the Indian Penal Code, whereas there can be no doubt that they fall within the purview of section 182. On these grounds we set aside the order of the Sessions Judge and send the record back to his court, directing him to re-admit the appeals of Kashi Ram and Baldeo to the file of pending appeals and dispose of the same on the merits. We understand that the accused Kashi Ram and Baldeo have been released on bail. They should continue at large on the same security until the appeal itself has been properly disposed of.

Application allowed.

APPELLATE CIVIL.

1914
November, 28.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

PARMESHWAR DAT (PLAINTIFF) v. ANARDAN DAT (DEFENDANT).*

Benamidar—*Right of suit.*

Held in suit for sale on a mortgage that the facts that the mortgagee named in the bond is only a *benamidar* and that the real owner of the bond is known to the court are no bar to the maintenance of the suit by the person named in the bond as mortgagee. *Yad Ram* v. *Umrao Singh* (1) referred to.

THIS was a suit for sale upon a mortgage. The mortgage deed was executed by the defendant in favour of the plaintiff. The defence to the suit, among others, was that the plaintiff was only a *benamidar* for one Bhaia Lal and could not maintain the suit without the consent of the beneficial owner. The plaintiff called Bhaia Lal as a witness and he stated that he was the real owner of the bond. The lower appellate court dismissed the suit holding that "the respondent is not the owner of the bond in suit; he has no right to bring the present suit." The plaintiff appealed.

Mr. *D. R. Sawhny*, for the appellant, submitted that a *benamidar* could maintain a suit. The test is whether he could give a valid discharge. A person in whose favour a bond is executed could give such a discharge; *Nand Kishore Lal* v. *Ahmad Ata* (2), *Yad Ram* v. *Umrao Singh* (1).

Munshi *Damodar Das*, for the respondent, submitted that a *benamidar* could sue only with the consent or on behalf of the beneficial owner. He is only entitled to give a discharge with the real owner's consent. The case in 18 All., it was submitted, was really in favour of the respondent.

Mr. *D. R. Sawhny*, was not heard in reply.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit on foot of a mortgage, dated the 22nd of March, 1900. Various pleas were taken, but the court of first instance decided in favour of the plaintiff and granted a decree. On appeal the learned District Judge reversed the order of the court of first instance and dismissed

*Second Appeal No. 1652 of 1913, from a decree of Austin Kendall, District Judge of Cawnpore, dated the 15th of September, 1913, reversing a decree of Achal Behari, Subordinate Judge of Banda, dated the 25th of April, 1913.

(1) (1899) I. L. R., 21 All., 380. (2) (1895) I. L. R., 18 All., 69.

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PARMESHWAR DAT v. ANARDAN DAT.

the plaintiff's suit on the sole ground that one Bhaia Lal was the real owner of the bond and that the plaintiff was merely a *benamidar* for him. It seems to us that the view of the District Judge was not correct. The alleged beneficial owner Bhaia Lal was actually produced as a witness for the plaintiff. He raised no objection whatever to the decree being made in favour of the plaintiff. The defendant never alleged that Bhaia Lal had made any claim, or raised any objection, to the amount of the bond being paid to the plaintiff. The plaintiff is the person named in the mortgage and was clearly entitled to sue, even if he was the *benamidar*. This was held in the case of *Yad Ram* v. *Umrao Singh*(1). There can not be the least doubt that the plaintiff could have given a perfectly valid discharge to the defendant if he had paid up the amount of the bond; and if the Court grants a decree to the plaintiff it is quite clear that Bhaia Lal could never sue again, even if we assume the finding of the lower appellate court to be correct that Bhaia Lal was in fact the real onwer of the bond. We think that the view taken by the court of first instance on this point, namely, that the question of the ownership of the bond did not arise under the circumstances of the present case, was correct. We, accordingly, allow the appeal, set aside the decree of the court below and remand the case to the lower appellate court with directions to re-admit the appeal upon its original number on the file and to proceed to hear and determine the same according to law. The costs of both sides will be costs in the cause. The deficiency in the court fee in the lower appellate court of Rs. 5 due by the defendant must be made good before the appeal is heard. If that amount is not paid within a time to be fixed by the court, the appeal to that court by the defendant ought to be dismissed.

Appeal decreed and cause remanded.

(1) (1899) I. L. R., 21 All., 380.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1914
December, 4.

MANGAL SEN AND OTHERS (PLAINTIFFS) *v.* MUHAMMAD HUSAIN AND ANOTHER (DEFENDANTS)*

Contract—Privity of contract—Right of third parties to sue on covenant in lease.

Where on a lease of certain muafi land the lessees undertook, as between themselves and their lessor, to be responsible for the payment to the zamindars of certain sums which the muafidar was primarily bound to pay, it was *held* that the zamindars could not enforce this covenant by suit against the lessees. *Khwaja Muhammad Khan* v. *Husaini Begam* (1), *Touche* v. *The Metropolitan Railway Warehousing Company* (2) and *Debnarayan Dutt* v. *Chunilal Ghose* (3) distinguished.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case appear from the judgement under appeal, which was as follows:—

"On the two issues remitted by my learned predecessor the court below has found, in regard to the first, that a sum of Rs. 790 cash, was recovered by the defendant No. 3 from the defendants Nos. 1 and 2 in respect to the years in suit; and on the second issue, it has also come to a finding, but it seems to me that that issue does not arise and requires no decision in this appeal. The facts of the case may be very briefly stated as follows. The village in question consists of 2 *pattis*; one 6 biswa *patti* and the other 14 biswa *patti*. It is held revenue-free. In the land which constitutes the village there are two classes of proprietary rights, the so-called zamindari and the so-called *muafidari*. The zamindar is a person to whom the *muafidar* has to pay 10 per cent. of his collections in the case of cash rents and 2 seers per maund in the case of rent payable in kind. The person in possession is the *muafidar*. The sole right therefore of the zamindar in this village is to recover the above mentioned dues from the person in possession. How this right arose, it is impossible to say on the present state of the record. There is no evidence on the point at all. The present plaintiffs have acquired the zamindari rights, i.e., the right to recover the 10 per cent. from the person in possession. They have also acquired the 6 biswa *patti* of the so-called *muafidari* rights. As owners of the zamindari rights they have sued to recover the 10 per cent. dues from the owner of the 14 biswa *patti* on the collections made in respect to that *patti* for the years 1316 and 1317 F. The owner of this *patti* gave a lease thereof to the defendants Nos. 1 and 2. The plaintiff impleaded them as defendants. By the terms of their lease, these first two defendants agreed with the defendant No. 3 to pay to the zamindar his *haq-i-zamindari*. The courts below have given a decree against the first two defendants, holding that they were bound by their contract with defendant No. 3 to pay the *haq-i-zamindari* to the plaintiffs.

* Appeal No. 19 of 1914, under section 10 of the Letters Patent.

(1) (1910) I. L. R., 32 All., 410. (2) (1871) L. R., 6 Ch. App., 671.

(3) (1913) I. L. R., 41 Calc., 137.

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PARMESHWAR DAT v. ANANDAN DAT.

the plaintiff's suit on the sole ground that one Bhaia Lal was the real owner of the bond and that the plaintiff was merely a *benamidar* for him. It seems to us that the view of the District Judge was not correct. The alleged beneficial owner Bhaia Lal was actually produced as a witness for the plaintiff. He raised no objection whatever to the decree being made in favour of the plaintiff. The defendant never alleged that Bhaia Lal had made any claim, or raised any objection, to the amount of the bond being paid to the plaintiff. The plaintiff is the person named in the mortgage and was clearly entitled to sue, even if he was the *benamidar*. This was held in the case of *Yad Ram* v. *Umrao Singh*(1). There can not be the least doubt that the plaintiff could have given a perfectly valid discharge to the defendant if he had paid up the amount of the bond; and if the Court grants a decree to the plaintiff it is quite clear that Bhaia Lal could never sue again, even if we assume the finding of the lower appellate court to be correct that Bhaia Lal was in fact the real onwer of the bond. We think that the view taken by the court of first instance on this point, namely, that the question of the ownership of the bond did not arise under the circumstances of the present case, was correct. We, accordingly, allow the appeal, set aside the decree of the court below and remand the case to the lower appellate court with directions to re-admit the appeal upon its original number on the file and to proceed to hear and determine the same according to law. The costs of both sides will be costs in the cause. The deficiency in the court fee in the lower appellate court of Rs. 5 due by the defendant must be made good before the appeal is heard. If that amount is not paid within a time to be fixed by the court, the appeal to that court by the defendant ought to be dismissed.

Appeal decreed and cause remanded.

(1) (1899) I. L. R., 21 All., 380.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1914
December, 4.

MANGAL SEN AND OTHERS (PLAINTIFFS) *v.* MUHAMMAD HUSAIN AND ANOTHER (DEFENDANTS)*

Contract—Privity of contract—Right of third parties to sue on covenant in lease.

Where on a lease of certain muafi land the lessees undertook, as between themselves and their lessor, to be responsible for the payment to the zamindars of certain sums which the muafidar was primarily bound to pay, it was *held* that the zamindars could not enforce this covenant by suit against the lessees. *Khwaja Muhammad Khan* v. *Husaini Begam* (1), *Touche* v. *The Metropolitan Railway Warehousing Company* (2) and *Debnarayan Dutt* v. *Chunilal Ghose* (3) distinguished

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case appear from the judgement under appeal, which was as follows:—

"On the two issues remitted by my learned predecessor the court below has found, in regard to the first, that a sum of Rs. 790 cash, was recovered by the defendant No. 3 from the defendants Nos. 1 and 2 in respect to the years in suit, and on the second issue, it has also come to a finding, but it seems to me that that issue does not arise and requires no decision in this appeal. The facts of the case may be very briefly stated as follows. The village in question consists of 2 *pattis*: one 6 biswa *patti* and the other 14 biswa *patti*. It is held revenue-free. In the land which constitutes the village there are two classes of proprietary rights, the so-called zamindari and the so-called *muafidari*. The zamindar is a person to whom the *muafidar* has to pay 10 per cent. of his collections in the case of cash rents and 2 seers per maund in the case of rent payable in kind. The person in possession is the *muafidar*. The sole right therefore of the zamindar in this village is to recover the above mentioned dues from the person in possession. How this right arose, it is impossible to say on the present state of the record. There is no evidence on the point at all. The present plaintiffs have acquired the zamindari rights, i.e., the right to recover the 10 per cent. from the person in possession. They have also acquired the 6 biswa *patti* of the so-called *muafidari* rights. As owners of the zamindari rights they have sued to recover the 10 per cent. dues from the owner of the 14 biswa *patti* on the collections made in respect to that *patti* for the years 1316 and 1317 F. The owner of this *patti* gave a lease thereof to the defendants Nos. 1 and 2. The plaintiff impleaded them as defendants. By the terms of their lease, these first two defendants agreed with the defendant No. 3 to pay to the zamindar his *haq-i-zamindari*. The courts below have given a decree against the first two defendants, holding that they were bound by their contract with defendant No. 3 to pay the *haq-i-zamindari* to the plaintiffs.

* Appeal No. 19 of 1914, under section 10 of the Letters Patent.

(1) (1910) I. L. R., 32 All., 410. (2) (1871) L. R., 6 Ch. App., 671.

(3) (1913) I. L. R., 41 Calc., 137.

at Calcutta in a case where a debtor had transferred his liability to a third person. *Debnarayan Dutt* v. *Chunilal Ghose* (1). In the present case the lessees had executed a kabuliat promising to be "responsible for zamindari dues."

Claims like these were based upon equitable grounds and equity was in favour of the plaintiff. He then referred to and discussed *Gregory and Parker* v. *Williams* (2), *Touche* v. *Metropolitan Railway Warehousing Company* (3) and *Jahandar Baksh Mullik* v. *Ram Lal Hazrah* (4).

Mr. *B. E. O'Conor*, for the respondents :—

A person who is not a party to a contract cannot sue. Unless he accepts all the rights and liabilities under the contract he cannot be said to be a *cestui que trust*. In the cases cited the benefit accrued to the plaintiff and he accepted the benefit. In the company case the contract was accepted by the company and so the company was held liable. In the Calcutta case the plaintiff had acknowledged the transferee from the debtors to be his debtor. Unless special circumstances are proved the case cannot be taken out of the general rule. No such circumstances are proved. The general rule is, therefore, applicable.

The Hon'ble Dr. *Tej Bahadur Sapru*, in reply :—

Acceptance on the plaintiff's part was quite immaterial, and even if it was necessary, the mere fact that the plaintiff brought this suit against the lessees showed that he accepted the defendants to be his debtors.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit in which the plaintiffs claimed zamindari dues. They made defendants to the suit a certain *muafidar* and also two lessees from the *muafidar*. It is admitted that the zamindars were entitled to dues (though not the amount claimed) from the *muafidar*. Under the terms of the lease the other defendants, that is to say, the lessees from the *muafidar*, undertook to pay the zamindari dues. The plaintiffs mainly claimed against the lessees but stated that for the sake of precaution the *muafidar* was also made a defendant and that if they were not entitled to a decree against the lessees they might have a decree against him. The lessees (the

(1) (1913) I. L. R., 41 Calc., 137.
(2) (1817) 3 Mer., 582.
(3) (1871) L. R. 6 Ch. App., 671.
(4) (1910) I.L.R., 37 Calc., 449.

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respondents to the present appeal), pleaded, first, that they were not liable to the plaintiffs, inasmuch as they had never entered into any contract with them, and, secondly, that if they were at all liable the dues were not as claimed by the plaintiffs. The court of first instance granted a decree against the present respondents exempting the *muafidar*. The respondents appealed, with the result that the decree of the court of first instance was confirmed. The plaintiffs preferred no appeal against the dismissal of their claim against the *muafidar*. In second appeal to this Court the decrees of the courts below were set aside and the plaintiffs' suit dismissed. Against this decree the plaintiffs have preferred the present Letters Patent Appeal. The only point to be decided is whether or not under the circumstances of the present case the plaintiffs were entitled to sue the defendants, the lessees. It is admitted that there was no privity of contract. It is also admitted that the respondent's liability (if any) is under the terms of their contract with their lessor, the *muafidar*. In our opinion the learned Judge of this Court was correct in the view he took.

The learned advocate on behalf of the appellants contends that wherever there is a contract under which a third party may obtain a benefit, he is entitled to sue upon that contract just as fully as he could do if he had been a party to it. We think that such a proposition is altogether too wide. In the present case it is pretty clear that if the plaintiffs thought it was to their advantage they might even have refused to recognize the respondents as the persons liable to pay their dues. We may also point out that in many cases it would be extremely inconvenient that parties should be sued by persons who were no parties to the contract. On the strict words of the present contract the lessees as between themselves and their lessor were liable to pay the "zamindari dues," and yet we find that there is a difference of opinion between the plaintiffs and the respondents as to what these dues were. The plaintiffs never agreed to accept the respondents as the persons to whom they would look for the payment of their dues. They never in any way altered their position in consequence of the contract which the respondents entered into with their lessor. We think there can be no doubt that the general rule is that a party cannot make another person liable upon a contract to which

the suing party was not privy. There are no doubt exceptions to this rule. We think that it may fairly be said that in all such cases as the defendant would be liable in a "Court of Equity" the courts in this country should hold him liable. But we do not think that the present is a case in which a "Court of Equity" could grant the plaintiff relief. The case of *Khwaja Muhammad Khan* v. *Husaini Begam* (1), has been cited In that case there was a marriage arrangement between the defendant and the father of the plaintiff whereby the defendant agreed to pay Rs. 500, a month to the plaintiff and charged certain property with the payment of the money. It was held that the plaintiff, although no party to the contract, was entitled to enforce it. At page 413 of the report their Lordships of the Privy Council say: "Here the agreement executed by the defendant specially charges immovable property *for the allowance which he binds* himself to pay to the plaintiff; she is the only person beneficially entitled under it. In their Lordships' judgement although no party to the document, she is clearly entitled to proceed in equity to enforce her claim."

The case of *Touche* v. *The Metropolitan Railway Warehousing Company* (2) was also quoted. There the plaintiff had done work at the instance of a promoter of a company. The articles of the association provided that in certain events the sum of £ 2,000 would be paid to one of the promoters for the plaintiff who had done the work. It was held that the plaintiff could get the money from the company. A copy of the articles of association had been sent to the plaintiff, he had done the work and the company had got the benefit of his labours.

In the case of *Debnarayan Dutt* v. *Chunilal Ghose* (3), it was also held that the plaintiff, though not a party to the arrangement between the defendant and the third party, was entitled to be paid a sum of Rs. 300 and interest. At page 142 the facts of the case are briefly stated by the learned Chief Justice:—"On the 22nd of July, 1899, defendants Nos. 1 to 4 borrowed from the plaintiff a sum of Rs. 300, and by way of security for this they gave a personal covenant by a registered

(1) (1910) I. L. R., 32 All., 410. (2) (1871) L. R., 6 Ch. App., 671.

(3) (1913) I. L. R., 41 Calc., 137.

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bond and also purported, though ineffectually, to create a charge by deposit of a *pattah* relating to immovable property. Interest was paid upon this bond up to the 13th of April, 1903, and on the 18th of August, 1903, defendants 1 to 4 executed a registered instrument of transfer of all their property, movable, and immovable, to defendant No. 5 for a sum of Rs. 2,000, becoming thereby, as the plaintiff describes it, 'rightless.' This Rs. 2,000 was not all paid in cash, but there was the provision and declaration in the *kabala* that out of this consideration money of Rs. 2,000, amongst other things, the sum of Rs. 330 due to the plaintiff should be paid by the defendant No. 5. On the very same day there was an arrangement between the plaintiff and defendant No. 5, under which the liability of defendant No. 5 under the transfer was acknowledged and accepted, and either then or in connection therewith this *pattah* was handed over to defendant No. 5."

It is clear that in all these cases the plaintiff had an "equity" which would always have been enforced by an English Court of Equity. The facts of the present case, as already pointed out, are quite different. We think the view taken by the learned Judge of this Court was correct and we dismiss the appeal with costs.

Appeal dismissed.

1914
December, 3.

Before Mr. Justice Chamier and Mr. Justice Piggott.

RAM DULARI (PLAINTIFF) v. BALAK RAM AND ANOTHER (DEFENDANTS) *

Execution of decree—Attachment of undivided share in house—Conditional decree for partition pending attachment—Purchase of judgement-debtor's share by decree-holder—Decree-holder not entitled to benefit of decree for partition.

A decree-holder attached in execution of his decree his judgement-debtor's undivided share in a house. Pending the attachment the judgement-debtor sued for partition of the house and obtained a decree for separate possession of her share conditional on payment of Rs. 237 into court. The decree-holder then brought to sale the share allotted to his judgement-debtor, and, having paid into court the Rs. 237 which the judgement-debtor had omitted to pay, asked for delivery of possession of the specific share purchased.

Held that, whether or not the decree-holder might ultimately be entitled to the full benefit of the decree for partition in favour of his judgement-debtor on payment of the sum of Rs. 237, all he acquired by his purchase was a right

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* Second Appeal No. 134 of 1914, from a decree of F. S. Tabor, District Judge of Shahjahanpur, dated the 12th of November, 1913, confirming a decree of Gokul Prasad, Subordinate Judge of Shahjahanpur, dated the 13th of May, 1913.

to be put into possession of the undivided share to which his judgement-debtor was entitled.

THE facts of this case were as follows :—

One Bálak Ram held a Munsif's Court decree for money against Musammat Sundar. In execution thereof he attached and advertised for sale her share (⅙) in a certain house. Subsequently, on the 14th of September, 1908, Musammat Sundar brought a suit in the Subordinate Judge's court against Musammat Ram Dulari and others for partition of her ⅙th share in the house. On the 31st of March, 1909, a preliminary decree for partition was passed awarding to her a specific ⅙th share (being lot No. 2) conditionally upon her paying into court the sum of Rs. 237-2-0. Musammat Sundar did not pay in the amount and did not execute the decree. On the 20th of July, 1911, Balak Ram, in execution of his above mentioned decree brought to sale, and himself purchased the specific share of the house allotted to Musammat Sundar under the partition decree. On the 3rd of February, 1912, he applied to the Munsif for possession of the specific share, and on the 12th of February, 1912, he deposited Rs. 237-2-0 in the court of the Subordinate Judge, although he had not obtained an assignment of the decree from Musammat Sundar. Musammat Ram Dulari objected to possession being granted to him, but the Munsif overruled her objection and granted possession. Thereupon Musammat Ram Dulari brought a suit for establishment of her ownership and possession of the house and for a declaration that Balak Ram had no right to recover possession of the house by virtue of his purchase. The suit was dismissed by both the courts below. The plaintiff appealed.

Babu *Sarat Chandra Chaudhri*, for the appellant :—

Balak Ram is not entitled to specific one-sixth share. He purchased only an undivided sixth share. If Musammat Sundar had deposited the sum of Rs. 237-2-0 and executed the partition decree she would have perfected her title to the specific sixth share which had been allotted to her. By purchasing the right, title and interest of Musammat Sundar, Balak Ram did not derive a right to execute the decree obtained by her. Unless he gets an assignment of the decree from her and executes it he cannot obtain any benefit under it. The money was deposited by

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him as a mere stranger. Merely becoming the representative of Musammat Sundar would not entitle him to go and take possession of property which had been allotted to her by a decree of a court other than the Munsif, and which decree she has never proceeded to execute.

Mr. *A. P. Dube* (with him Munshi *Benode Behari*), for the respondent:—

When Balak Ram attached the share of Musammat Sundar in the house it was no doubt an undivided share. But when she filed a suit for her specific share and it was decreed, the share, which had been attached by Balak Ram, became specific, subject only to the condition of Rs. 237-2-0 being paid into court. By virtue of the partition decree the right, title and interest of Musammat Sundar became a specific share subject to the payment of the money. Balak Ram purchased all her rights, that is, this specific share subject to that condition which has since been fulfilled. Therefore he is entitled to the specific share. In no case is the plaintiff entitled to a declaration of ownership and possession of the whole house. Balak Ram has purchased at least an undivided sixth. Musammat Sundar is a party to this case; she does not complain. The plaintiff's objection is only technical; she has to give up a sixth share in any case.

CHAMIER and PIGGOTT, JJ.—The first respondent obtained in a Munsif's court a decree against the second respondent, in execution of which, some time before the end of March, 1908, he attached the second respondent's one-sixth share in a house. In September, 1908, while the share was under attachment, she brought a suit in a Subordinate Judge's court against the appellant and others for partition and separate possession of her share, and in March, 1909, she obtained a decree, which was subject to a condition that she should pay Rs. 237 into court. She has never paid in the money, and consequently the decree has not been executed. In July, 1911, the first respondent brought to sale in execution of his decree and purchased himself the specific share allotted to the second respondent by the decree in the partition suit. In February, 1912, he paid Rs. 237 into the court of the Subordinate Judge and immediately afterwards he applied to the Munsif for delivery of possession of the specific share purchased by

him. The appellant objected, but her objection was disallowed, and she then brought the present suit claiming a declaration that she is owner and in possession of the house and that the first respondent is not entitled to obtain possession of the house by virtue of his purchase at the execution sale. The first court dismissed the suit on a ground that is clearly untenable. On appeal the District Judge confirmed the dismissal of the suit upon the ground that, although the second respondent was not entitled to a specific share in the house till she paid the sum of Rs. 237 into court, and therefore no specific share passed to the first respondent at the execution sale, yet the latter must have acquired the right, title and interest of Musammat Sundar, and was entitled to stand in her shoes, and having paid the required sum into court before execution of the decree became time-barred, was entitled to execute the decree obtained by her. The appellant is obviously not entitled to the relief claimed in the plaint, for at the date of the suit she certainly was not the sole owner of the house and the first respondent had never attempted to get possession of the whole house, but the facts are all before us and we may properly give her such relief as she may be entitled to. It appears to us that what passed to the first respondent at the execution sale was the right, title and interest of Musammat Sundar to and in an undivided one-sixth share, even though it may have been wrongly described as a specific or separate share in the house, and the first respondent was entitled to go to the Munsif and get himself placed in possession of the undivided share. It is not for us to decide whether before or after obtaining possession of the share in this way the first respondent was or is entitled to go to the court of the Subordinate Judge and execute the decree obtained by Musammat Sundar. That is a matter for the Subordinate Judge to decide. It is quite clear that the first respondent was not, by virtue only of his purchase, entitled to be placed by the Munsif in separate possession of that portion of the house which would have passed into the possession of Musammat Sundar if she had executed her decree, and we think that the appellant was and is entitled to a declaration that the first respondent is not entitled to separate possession of any specific portion of the house by virtue only of his purchase at the execution sale. We allow

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the appeal and make a declaration to this effect. The parties will pay their own costs throughout.

Appeal decreed.

1914 December, 5.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

MUHAMMAD WALI KHAN (PLAINTIFF) v. MUHAMMAD MOHI-UD-DIN KHAN AND OTHERS (DEFENDANTS)*

Civil Procedure Code (1908), section 109 (c)—Appeal to His Majesty in Council—Practice—Grounds for granting certificate in case of connected appeals.

It is a good ground for granting a certificate of fitness for appeal to His Majesty in Council under section 109 (c) of the Code of Civil Procedure that the case in which leave to appeal is sought is an appeal from the same decree and involving the same questions as another appeal in respect of which the same applicant has a right of appeal under sections 109 and 110 of the Code.

A SUIT was filed in the court of the Subordinate Judge of Cawnpore by one Muhammad Wali Khan for possession of immovable property and mesne profits, the suit being valued at about Rs. 35,000. The claim was partly decreed and partly dismissed. From this decree the plaintiff appealed to the High Court (F. A. No. 156 of 1910) as to the portion of the claim which had been dismissed, and some of the defendants appealed (F. A. No. 186 of 1910) as to the portion decreed.

In the plaintiff's appeal the High Court agreed with the court below and dismissed it. The defendants' appeal on the other hand was allowed.

In each case the plaintiff applied for leave to appeal to the Privy Council; but whereas in First Appeal No. 186 of 1910 the case fulfilled the requirements of section 110 of the Code of Civil Procedure, in First Appeal No. 156 of 1910, although the value was sufficient, the High Court had agreed with the court below.

The Hon'ble Mr. *Abdul Raoof*, for the appellant.

The Hon'ble Dr. *Sundar Lal* (The Hon'ble Dr. *Tej Bahadur Sapru*, with him), for the respondent.

RICHARDS, C. J., and BANERJI, J.—The value of the subject-matter of the suit out of which this appeal arises and of the proposed appeal to His Majesty in Council exceeds Rs. 10,000, but this Court affirmed the decree of the court of first instance.

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* Privy Council Appeal No. 28 of 1913.

We have, therefore, to see whether the case fulfils the requirements of section 110 of the Code of Civil Procedure, or is otherwise a fit one for appeal to His Majesty in Council.

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The question which is involved in Appeal No. 29 is involved in the proposed appeal. Both appeals arise out of the same suit. To a large extent at least the decree of this Court will be wrong in the event of their Lordships of the Privy Council differing from the view taken by this Court in Appeal No. 29. We think, therefore, under the special circumstances of this case, that we are justified in certifying that the case is "otherwise a fit one for appeal to His Majesty in Council" and we so certify.

Leave granted.

FULL BENCH.

1914 *December*, 11.

Before Justice Sir George Knox, Mr. Justice Rafiq and Mr. Justice Piggott

STAMP REFERENCE BY THE BOARD OF REVENUE.*

Act No II of 1899 (Indian Stamp Act), section 57 (b)—Reference by Board of Revenue—Document to which reference relates not in existence.

Held that sections 56 and 57 of the Indian Stamp Act empower the High Court to decide questions relating to instruments already in existence and which have been made the subject of action by the Collector acting under sections 31, 40 and 41 of the Act.

They do not empower the Court to give an opinion upon a deed which may or may not come into existence hereafter.

THIS was a reference under section 57 (*b*) of the Indian Stamp Act, 1899, made by the Board of Revenue for the United Provinces.

The terms of the reference were as follows :—

"Under section 17 of the Bundelkhand Alienation of Land Act (II of 1903), when a Civil Court passes a decree against a member of an agricultural tribe on a mortgage made before the Act came into force, the decree is sent to the Collector who shall offer the decree-holder a mortgage in form (*a*) or (*b*) in full satisfaction of the decree: The question for ruling of the High Court is whether such a mortgage requires to be registered and stamped or not. The Board think that neither registration nor stamping is required, because, (*a*) if the mortgage is executed on behalf of Government it is exempt from stamp duty under section 3 (1) of

*Civil Miscellaneous No. 582 of 1914.

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STAMP REFERENCE BY THE BOARD OF REVENUE.

the Stamp Act, (b) if this view is incorrect the transaction is not a new one between the parties and it would be highly inequitable to demand double stamp duty on it. The Board think that it is a substituted transaction effected by the court's order. It is probable that the Collector when acting under section 17 is a court and that the mortgage is really the order of a court which does not require registration or stamping. This seems to be probably the reason why a mortgage under section 17 is not mentioned in item 20 of Appendix C to the Stamp Manual."

Mr. *A. E. Ryves*, for the Crown.

KNOX, RAFIQ and PIGGOTT, JJ.—In reply to our order dated the 8th of July, 1914, the Secretary to the Board of Revenue sends us a sample form of mortgage under section 6A of the Bundelkhand Alienation of Land Act and adds that there are no sample forms under section 6(b). We understand from this reply that the reference made to us does not refer to a particular deed in existence, but to some deed which may or may not hereafter come into existence. Section 56 of the Stamp Act confers upon this Court power to deal with instruments which are already in existence, and which have been made the subject of action by the Collector acting under sections 31, 40 and 41 of Act No. II of 1899. The Board have sent on the reference under section 57 of the above named Act. Comparing the language of section 56 with that of section 57 we are of opinion that section 57 contemplates a decision being given under circumstances and upon documents of the same nature as those referred to in section 56 of the Act. The present case falls under neither of these sections. We have no jurisdiction to give any opinion upon documents other than those already mentioned. We, therefore, direct that this our judgement be returned to the Board of Revenue for their information.

REVISIONAL CRIMINAL.

1914
December, 11.

Before Justice Sir George Knox.

EMPEROR *v.* RAM CHANDRA*

Criminal Procedure Code, section 345—Compounding offences—Revision—Powers of High Court—Court not competent to allow composition in revision

Held, that the High Court has no power to allow a case to be compounded which is before it in the exercise of its revisional jurisdiction.

THIS was a reference made by the Sessions Judge of Meerut in which he suggested that the High Court might under special circumstances permit a certain case to be compounded. The facts out of which the reference arose appear from the Sessions Judge's order, which was as follows:—

"On the 12th of October, Umrao Singh was convicted by Mr. Sale, Joint Magistrate of Meerut, under section 325 of the Indian Penal Code in respect of grievous hurt caused to his mother Musammat Gomti. He has appealed and Musammat Gomti has filed an application to be permitted to compromise the case considering the comparative lightness of the injury which constituted grievous hurt and the relation of the parties. I have accepted the compromise and acquitted Umrao Singh under section 345 of the Code of Criminal Precedure.

"At the time Mr. Sale convicted Ram Chandra under section 352 of the Indian Penal Code for an assault committed on Musammat Gomti in the same quarrel and sentenced him to fifteen days rigorous imprisonment. Ram Chandra has applied in revision and Musammat Gomti has filed an application to compromise the case against him.

"Under section 438, Code of Criminal Procedure, I report the case for the orders of the Hon'ble High Court with the recommendation that the compromise be accepted, that the non-appealable sentence passed upon Ram Chandra be reversed and that he be acquitted under section 345, Code of Criminal Procedure, at the same time I order that the execution of Ram Chandra's sentence be suspended. He is on bail of Rs. 100 and he will remain on bail pending the order of the Hon'ble High Court."

The parties were not represented.

* Criminal Reference No. 961 of 1914.

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EMPEROR v. RAM CHANDRA.

KNOX, J.—The learned Judge in making this appears to have overlooked the provisions of clause (7) of 345 of the Code of Criminal Procedure. This forbids the position of an offence being accepted except as provided by 345.

Section 345 specially allows a case in which an appeal is to be opened to composition with the leave of the court before which the appeal is to be heard, but in it there is no mention of cases which come up on revision, and similarly there is no provision made in section 439 of the Code as to applying the powers granted in section 345 to cases in revision. The recommendation of the Judge, therefore, cannot be accepted. The accused person must submit to arrest and complete the sentence imposed upon him when he was convicted.

Let the record be returned.

Before Mr. Justice Tudball.

EMPEROR v. BISHAN PRASAD.*

1914 18. ember,

Act No. XLV of 1860 (*Indian Penal Code*), *section* 185—"*Property*"—*Exclusive right to sell drugs.*

Held, that a person who bid at an auction of the right to sell drugs within a certain area under a false name, and when the sale was confirmed in his favour, denied that he had ever made any bids at all, was rightly convicted of an offence under section 185 of the Indian Penal Code. *Queen* v. *Reasoddeen* (1) referred to.

IN this case the applicant Bishan Prasad attended an auction sale of the right to vend drugs within certain areas which was being held by the Collector and made bids; but he bid under a false name, and when finally his last bid was accepted by the Board of Revenue, he denied that he had ever made any bids at all. In respect of these acts he was prosecuted and convicted under section 185 of the Indian Penal Code. Against this conviction he applied in revision to the High Court.

Mr. *Ross Alston* and Babu *Satya Chandra Mukerji*, for the applicant.

The Assistant Government Advocate (Mr. *R.* for the Crown.

*Criminal Revision No. 1086 of 1914, from an order of G. C. Sessions Judge of Mainpuri, dated the 15th of August, 1914

(1) (1865) 3 W. R., Cr. R., 33.

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EMPEROR v. BISHAN PRASAD.

TUDBALL, J.—The applicant Bishan Prasad has been convicted under section 185 of the Penal Code and has been sentenced to a fine of Rs. 100. He made bids at a sale held by the Collector of the right to sell drugs in a certain tahsil and gave a false name. When finally his last bid was sanctioned by the Board of Revenue, he denied that he had ever made any bids at all, and he has accordingly been prosecuted under section 185 of the Code. The point raised on his behalf is that section 185 does not contemplate a sale of this description. The language of the section, however, is wide. The right to sell drugs is a monopoly granted for a certain area and comes within the definition of property. It is impossible to hold that the word "property" in section 185 is not used in its wide sense. The gist of the offence in the present case was the intention in the applicant's mind not to perform the obligation under which he was laying himself at the time of bidding. The facts having been found against him, they clearly in my opinion come within the offence mentioned in the section. The case is similar to that of *Queen* v. *Reazooddeen* (1).

There is no ground for interference. The application is therefore rejected.

Application rejected.

PRIVY COUNCIL.

P C*
1914
October, 23, 26, 27.
November, 25

DIGAMBAR SINGH, (PLAINTIFF) *v.* AHMAD SAYED KHAN, (DEFENDANT).
[On appeal from the High Court of Judicature at Allahabad.]

*Pre-emption—Right of pre-emption—Effect of perfect partition on right of pre-emption—No fresh wajib-ul-arz prepared at or after partition—Right of a sharer in new mahal after partition to pre-empt property in another new mahal in which he was not a sharer at date of sale—Value of wajib-ul-arz as evidence—*Primâ facie *evidence of custom of pre-emption without proof of instances of custom being enforced.*

In this appeal, which was one arising out of a suit by the appellant, one of the co-sharers in a mauza, for pre-emption after there had been a partition of the mauza in which the land sold was situated, and no fresh wajib-ul-arz had been prepared after the partition had taken place, their Lordships of the Judicial Committee (affirming the decision of the High Court) were of opinion that the clauses relating to pre-emption contained in wajib-ul-arzes of 1863 and 1870, proved that prior to the partition the right of pre-emption had existed in the

* *Present:*—Lord DUNEDIN, Lord SHAW, Sir JOHN EDGE and Mr. AMEER ALI.

(1) (1865) 3 W. R., Cr. R., 33.

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mauza, but that the appellant had not shown either on the construction of the wajib-ul-arzes, or by other evidence, that the custom of pre-emption which obtained in the unpartitioned mauza survived the partition, so as to give the appellant, a sharer in one of the new mahals, a right to pre-empt property in another of those mahals in which he was not a sharer at the date of the sale.

Their Lordships did not dissent from the view expressed by BANERJI J. in the full bench case of *Dalganjan Singh* v. *Kalka Singh* (1) that "where a fresh wajib-ul-arz has not been prepared at partition, it does not follow as a matter of law or principle that the custom or contract in force before partition is no longer to have effect or operation," and were of opinion that the question must depend upon the circumstances of each case and the inferences which may legitimately be drawn from the evidence.

A wajib-ul-arz is by itself good *primâ facie* evidence of a custom of pre-emption stated in it without corroboration by evidence of instances in which the custom has been enforced. The evidence as to a custom of pre-emption afforded by a wajib-ul-arz may of course be rebutted by other evidence.

APPEAL 102 of 1913 from a decree (15th July, 1913,) of the High Court at Allahabad, which reversed a decree (28th March, 1911,) of the Subordinate Judge of Aligarh.

The suit which gave rise to this appeal was brought by the appellant Digambar Singh against Ahmad Sayed Khan the respondent, and one Bhawani Das to enforce the right of pre-emption over certain property in the Aligarh district forming part of mauza Pala Kher (otherwise known as Pala Kaser or Bilaksir) which had been sold by Bhawani Das to Ahmad Sayed Khan. In the property in suit the appellant alleged in his plaint that both Digambar Singh and Bhawani Das were sharers, and it was also alleged that the custom of pre-emption existed therein having been recorded in the wajib-ul-arz of the village in 1863 and 1870.

Mauza Pala Kher, which had been jointly assessed as one mahal, was in 1905 or 1906 partitioned and separate mahals were constituted, and the shares allotted to Digambar Singh and to Bhawani Das fell under separate revenue numbers, but no new wajib-ul-arz was recorded at the time of the partition.

By a sale-deed, dated the 12th July, 1909, and registered on the 6th August, 1909, Bhawani Das sold the property in suit to Ahmad Sayed Khan, to whom it had already been mortgaged with possession on the 6th of March, 1892, but Ahmad Sayed Khan was,

(1) (1899) I. L. R., 22 All., 1.

except for his rights under the mortgage, a stranger in the mauza.

The right of pre-emption was recorded as follows in the wajib-ul-arz of 1870:—"In future every co-sharer, mortgagor and mortgagee has as such power to make transfers. He shall have power to make transfers first to his own and ekjaddi (i. e. descended from a common ancestor) brothers, and next to co-sharers in the khata and patti as well as to proprietors. If none of the aforesaid persons takes the share he shall have power to transfer it to a stranger." The wajib-ul-arz of 1863 was in practically the same terms; they will be found set out in the judgement of their Lordships of the Judicial Committee.

The only other evidence as to the right of pre-emption was a judgement of the Subordinate Judge of Meerut, dated the 2nd of June, 1875, which was confirmed by the High Court on the 23rd of August, 1876. In that case pre-emption was allowed.

The defence set up was that after the partition the appellant was absolutely separate from Bhawani Das, and had no sort of coparcenary interest with him; that the defendant (respondent) was a co-sharer with Bhawani Das by reason of the usufructuary mortage of the 6th of March, 1892. The defendant denied the existence of the alleged custom of pre-emption and contended that in any case the custom only applied to the village so long as it was a single mahal, and not after its partition into several mahals.

The issues, so far as now material, were (1) whether there is a custom of pre-emption in mauza Pala Kher, and if so, in what terms? (2) whether the village was partitioned after the preparation of the wajib-ul-arz, and the old wajib-ul-arz is no more in force? (3) whether under the partition the plaintiff's mahal has been separated from that of the vendor and he has no right to pre-empt, or whether the plaintiff has still a preferential right to purchase? On these issues the Subordinate Judge held that the right of pre-emption existed in respect of the property comprised in the mauza, that the plaintiff (appellant) as one of the proprietors of the village was entitled to purchase the property in suit in preference to the defendant (respondent), who was a stranger; and that that right was not affected by the partition of the mauza. A decree was therefore made in the plaintiff's favour.

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An appeal to the High Court was heard by Sir H. G. RICHARDS, C. J., and Mr. JUSTICE TUDBALL, who held that the wajib-ul-arzes were not sufficient to establish a custom of pre-emption, and they consequently reversed the decision of the Subordinate Judge, and dismissed the suit.

THE CHIEF JUSTICE:—"I have already pointed out that while the defendant vendee was a mortgagee in possession of a substantial part of the mahal Bhawani Das, the plaintiff had no property in that mahal at all. The plaintiff was not a co-sharer in any property with the vendor. No joint and several responsibility existed between the plaintiff and the vendor for the payment of Government revenue. The plaintiff had no right to interfere in any way with the management of any part of the property comprised in the mahal Bhawani Das. He was a total 'stranger' in the sense that he did not belong to the coparcenary body which held mahal Bhawani Das.

"Has the plaintiff established the existence of a custom which gives him a right to pre-empt as against the defendant by the production of the two wajib-ul-arzes above mentioned? It is contended on his behalf that the clauses in the wajib-ul-arz show that every proprietor must, before selling his property, offer it to the other proprietors in the village, and that while he has to admit that he is not a proprietor in the mahal, he is a proprietor in the village. In my judgement the existence or non-existence of a custom of pre-emption cannot be said to depend upon the construction of a wajib-ul-arz. The wajib-ul-arz is not the custom. It is merely evidence, and as was pointed out by their Lordships of the Privy Council, there is no class of evidence that is more likely to vary in value according to circumstances than that of the wajib-ul-arzes. See *Anant Singh* v. *Durga Singh* (1). It is true that in that case their Lordships were not considering a custom of pre-emption, but it seems to me impossible to contend that there is any difference between the mode of proof of a custom of pre-emption and any other custom. All customs must be proved by sufficient evidence, and the more unusual and improbable the alleged custom is, the more cogent ought to be the evidence required to prove it. The language of the wajib-ul-arz must of course be considered and receive due weight, but the other circumstances must not be overlooked.

"I pause for a moment to consider the state of things in the village in the years 1863 and 1870. At the time every proprietor in the village was a co-sharer with the others in the unit, viz. the mahal. Does it not follow that the wajib-ul-arzes of 1863 and 1870 are of little or no value in considering the question of the existence of an alleged custom giving a right of pre-emption to a person who is not a co-sharer and has no community of interests or responsibility with the vendor? The result of perfect partition is that the old coparcenary body ceases to exist and new coparcenary bodies in each mahal are created. If the reason for customs of pre-emption is to avoid the introduction of a stranger, the custom which the plaintiff alleges would defeat the object. In the events that have happened the plaintiff is not an outsider so far as mahal Bhawani Das is concerned.

(1) (1913) I. L R, 32 All., 363 (373); L. R., 37 I. A., 191 (97).

As already stated, the evidence consists practically speaking of the wajib-ul-arz of 1863 and the wajib-ul-arz of 1870. It seems to me that these documents almost negative the existence of any custom of pre-emption. It is admitted by both sides that if they only refer to contracts or arrangements, such contracts or arrangements came to an end with the expiration of the settlements. The extracts begin by referring to a number of mortgages The mortgages were evidently made to persons who were strangers. This in itself is some indication that prior to 1863 there was no custom of pre-emption. It then goes on to speak of what is to be the practice in the future. We then find that the wajib-ul-arz is not signed by the co-sharers alone but also by several of the mortgagees. These circumstances seem strongly to suggest that it was not an existing custom that was being recorded in the wajib-ul-arz but an arrangement for the future between the members of the coparcenary body including the mortgagees of such members thereof as had mortgaged their shares. If necessary, I should be quite prepared to hold that the evidence does not establish the existence of any custom of pre-emption, but I am satisfied that the plaintiff, who has no interest in the mahal in which the property is situated, has altogether failed to prove a custom giving him a right of pre-emption against the defendant vendee, who was a mortgagee in possession of property in that mahal."

TUDBALL, J.:—"Not one single instance of the exercise of the custom is alleged. As for the two wajib-ul-arzes, two points stand out clear in my mind:—(1) They set out transfers that have been made in the past and set down an arrangement for the future made between both co sharers and mortgagees. (2) It is clear that mortgagees were treated by the coparcenary body as if they were co-sharers in the true sense of the word.

"It is urged that under the rulings of this Court it must be taken for granted that these entries relate *primâ facie* to an existing custom. Assuming this, the argument is met by the fact that not a single instance can be quoted of the custom having been exercised. To my mind two very ambiguous entries of this kind are totally insufficient evidence to establish a custom.

"There remains for consideration the effect of the partition.

"Assuming the custom to exist after partition (which was in existence before) the fact remains that such a custom gave a right of pre-emption to a person who was a co-sharer with the vendor in the same unit, to wit, the mahal. A wajib-ul arz is prepared not for a village but for a mahal After the partition, which was a perfect partition, the plaintiff's mahal and the vendor's mahal became as separate in every way as two separate villages, and there remained no community of interests between their owners. Each of the latter became a stranger to the mahal of the other. The custom gave no right of pre-emption to a person who was *not* a co-sharer in the mahal in which the vended property was situate.

"Lastly, the vendee in the present case being a mortgagee with possession in the same mahal as the vendor would, under these wajib-ul arzes, if they had any force as evidence of custom, be entitled to purchase even as against the pre-emptor."

On this appeal—

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G. R. Lowndes for the appellant, contended that the custom of pre-emption was established by the evidence afforded by the wajib-ul-arzes of 1863 and 1870. The mauza in 1863 was purely Muhammadan, and among Muhammadan co-sharers there would have existed a right of pre-emption, if not as a custom then by agreement of the co-sharers. See Syed Ameer Ali's Muhammadan Law, 4th Ed., Vol. 1, pages 718,720. As to the form of the wajib-ul-arz reference was made to Bengal Regulation VII of 1822, section 9; and N.-W. P. Land Revenue Act (XIX of 1873), section 52. [*De Gruyther, K. C.*, referred to Thomason's Directions for Revenue Officers in the N.-W. Provinces (Ed. 1858, page 14) and the case of *Returaji Dubain* v. *Pahlwan Bhagat* (1)]. If the right of pre-emption existed by agreement it could not have been altered or taken away except by consent of all the co-sharers, and therefore not by partition obtained by some or one of them. The question in this case was whether a "perfect partition." would determine the right of pre-emption, or whether that right would continue to exist after such a partition. It was submitted that there had not been a "perfect partition" as defined in section 107 of the North-Western Provinces Land Revenue Act (XIX of 1873); and section 3, sub-section 1, of that Act was referred to, which defines "mahal." A "mahal" was a revenue unit; it was not a village, which may consist of a number of mahals. It was essential that there should be a separate wajib-ul-arz for a mahal after partition, but here there had been no such record of rights made. It could not be the intention of Government that the right of pre-emption which admittedly once existed should be extinguished. It was submitted, therefore, that until another wajib-ul-arz was made the co-sharers would be bound by those of 1863 and 1870; and reference was made to *Shiam Sundar* v. *Amanat Begam* (2). [*De Gruyther, K. C.* If it be desired that the right of pre-emption should continue after partition it must be expressly so stated in the wajib-ul-arz.] The decided cases as to the effect of partition on the right of pre-emption may be divided into three classes. The first class take the view that partition has no effect, that is, the right of pre-emption would

(1) (1911) I. L. R., 33 All., 196. (2) (1887) I. L. R., 9 All., 234.

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remain after partition, as in *Gokal Singh* v. *Mannu Lal* (1); *Janki* v. *Ram Partap* (2) and *Sardar Singh* v. *Ijaz Husain Khan* (3). The second class decide that the right is determined by a perfect partition, as in *Ghure* v. *Man Singh* (4). And the cases in the third class are to the effect that whether the right survives depends upon the circumstances of each case, as in *Dalganjan Singh* v. *Kalka Singh* (5). Reference was also made to *Jagdam Sahai* v. *Mahabir Prasad* (6); *Gobind Ram* v. *Masih-ullah Khan* (7); *Dori* v. *Jiwan Ram* (8); *Returaji Dubain* v. *Pahlwan Bhagat* (9) and *Chephur* v. *Abdul Hakim* (10). *Anant Singh* v. *Durga Singh* (11) as to the value of wajib-ul-arzes as evidence, and Wilson's Glossary as to the definitions of pattidari and bhaiyachari tenures were also cited. The conclusion relied upon was that the right of pre-emption, whether based on custom or agreement, was not affected by the partition of the mauza in which the property in suit was situated.

De Gruyther, K. C., and *B. Dube* for the respondent contended that the right of pre-emption was purely a product of the Muhammadan law; there was no Hindu law of pre-emption. It is a right given to every sharer in the mahal in which the land belonging to a community is situated. The pre-emptor of any land sold must be a co-sharer. In Hamilton's Hedaya, Book 38, chapter I, treating of "the persons to whom the right of 'shuffa' appertains," the word used is 'partner,' and in other works is generally translated 'co-sharer.' The foundation of the right is co-ownership, that is, in a village community, joint ownership of the land. It is purely a personal right, and does not survive to the heirs of the pre-emptor. When there has been a division amongst the co-sharers, as in the present case, a 'perfect partition,' the right of pre-emption comes to an end. The appellant ceased to be a co-sharer and therefore lost his right of pre-emption. In this case a custom is set up at variance with the Muhammadan law of pre-emption, and it must be strictly proved, which the

(1) (1885) I. L. R., 7 All., 772.
(2) (1905) I. L. R., 28 All., 250.
(3) (1906) I. L. R., 28 All., 614.
(4) (1895) I. L. R., 17 All., 226.
(5) (1899) I. L. R., 22 All., 1.
(6) (1905) I. L. R., 28 All., 60
(7) (1907) I. L. R., 29 All., 295.
(8) (1910) I. L. R., 32 All., 265.
(9) (1910) I. L. R., 33 All., 196.
(10) (1910) I. L. R., 33 All., 206.
(11) (1910) I. L. R., 32 All., 363: L. R., 37 I. A., 191.

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appellant had failed to do. The cases of *Ganga Singh* v. *Chedi Lal* (1); *Digambur Misser* v. *Ram Lal Roy* (2); and *Gopal Sahi* v. *Ojoodheu Pershad* (3); were cited and relied upon; and reference was made to *Shiam Sundar* v. *Amanat Begam* (4); *Jagdam Sahai* v. *Mahabir Prasad* (5); *Jadu Lal Sahu* v. *Janki Koer* (6); *Joobraj Singh* v. *Tookun Singh* (7); *Rai Jainta Parshad* v. *Mir Muhammad* (8); *Badri Prasad* v. *Hasmat Ali* (9); *Mathra Prasad* v. *Nem Chand* (10); *Dalganjan Singh* v. *Kalka Singh* (11); Oudh Laws Act (XVIII of 1876) sections 6 to 10; Thomason's Directions to Revenue Officers in the North-Western Provinces, Ed. 1858, pages 1, 50, 53, 70, 76, 237, 240 and 249. Even under the terms of the wajib-ularzes produced by the appellant the respondent being a mortgagee in possession of land in one of the mahals in suit had a right to purchase the mahal in preference to the appellant who was a stranger to the mahal.

Lowndes in reply. The right of pre-emption after partition had been allowed in numerous cases since the Full Bench decision in *Dalganjan Singh* v. *Kalka Singh* (11). The argument based on Muhammadan law had never been suggested in any of the many cases in the Courts in India. If the right was dependent on the pre-emptor being a co-sharer, his being so or not was a question of fact which had not been raised in the lower courts, and should therefore not be entertained on this appeal. Reference was made to Hamilton's Hedaya, page 548; and to Thomason's Directions to Revenue Officers, North-Western Provinces, page 240.

1914, November 25th :—The judgement of their Lordships was delivered by Sir JOHN EDGE :—

The suit in which this appeal has arisen was brought on the 6th of August, 1910, in the Court of the Subordinate Judge of Aligarh by Kunwar Digambar Singh, who is the appellant here, against Kunwar Ahmad Sayed Khan, who is the respondent to this

(1) (1911) I. L. R., 33 All., 605 (615).
(2) (1887) I. L. R., 14 Calc., 761.
(3) (1865) 2 W. R., C. R., 47.
(4) (1887) I. L. R., 9 All., 234.
(5) (1905) I. L. R., 28 All., 60.
(6) (1912) I. L. R., 39 Calc., 915 (924): L. R., 39 I. A., 101 (106.)
(7) (1870) 14 W. R., C. R., 476.
(8) (1884) Oudh Rul. Appx., p. 7.
(9) (1904) 1 A. L. J., 33.
(10) (1905) 2 A. L. J., 261.
(11) (1899) I. L. R., 22 All., 1.

appeal, and one Bhawani Das, to enforce a right of pre-emption to which Kunwar Digambar Singh claimed to be entitled under a custom which he alleged to be prevailing in mauza Pala Kher in the district of Bulandshahr.

The respondent here, Kunwar Ahmad Sayed Khan, who was the vendee of the property in dispute, by his written statement denied that there was any custom of pre-emption in mauza Pala Kher and alleged that—

> "Mauza Pala Kher was divided by perfect partition and entirely separate mahals were formed . . . After the said partition no connection of any kind was left among the co-sharers of the different mahals, nor did any joint right, based on the terms of any wajib-ul-arz, subsist among them."

The date of the sale in respect of which pre-emption is claimed was the 12th July, 1909. In 1905, mauza Pala Kher, otherwise known as mauza Pala Kaser, and as mauza Bilaksir, was, on the applications of certain of the then sharers in the mauza, partitioned into five mahals, of which two were named respectively Salig Ram and Bhawani Das. On the partition, each of the five newly formed mahals became separately responsible for the revenue assessed upon it, but did not become responsible for the revenue assessed upon any other of the five mahals. No separate record of rights was before this suit framed for any of the five new mahals.

The property sought to be pre-empted is in mahal Bhawani Das, in which mahal the appellant had not a share at the date of the sale; he was, however, at that date a sharer in mahal Salig Ram, in which mahal neither the respondent nor his vendor, Bhawani Das, was a sharer. The respondent was not at the date of the sale a sharer in any of the five new mahals; he was, however, the mortgagee in possession of part of the share of Bhawani Das, the vendor, in mahal Bhawani Das. The appellant and Bhawani Das are not related to each other. The respondent, who is a Muhammadan, is not related to the appellant or to Bhawani Das. Prior to the partition of 1905 mauza Pala Kher was an unpartitioned mauza in which the appellant and Bhawani Das were sharers. Of the history of mauza Pala Kher prior to 1863 their Lordships are unaware, but in 1863 all the sharers in the mauza were apparently Muhammadans.

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The evidence to prove the custom of pre-emption upon which the appellant's claim is based, consisted of extracts from a wajib-ul-arz of mauza Pala Kher, of 1863, upon extracts from a wajib-ul-arz of the same mauza of 1870, and of a judgement of the Subordinate Judge of Meerut in 1875 in a suit for pre-emption, which was confirmed by the High Court at Allahabad in 1876. The cause of action in that case arose of course long anterior to the partition of mauza Pala Kher, but the judgements do afford evidence that there existed in mauza Pala Kher a custom of pre-emption under which a relation of a vendor—sharer in the mauza—was entitled to pre-empt on a sale to a stranger to the mauza, but that is not the custom upon which the appellant must rely in this suit.

The extract from the wajib-ul-arz of mauza Pala Kher, which was prepared on the 16th of June, 1863, as translated and so far as it is material, is as follows :—

"In future every co-sharer, mortgagor or mortgagee shall as such be at liberty to make transfers. But he shall make transfers first in favour of his own and *ekjaddi* brothers and after them in favour of co-sharers in the *khata* and *patti* as well as in favour of the proprietors of the village. If none of them take he shall be competent to make transfers in favour of strangers. If there is a dispute regarding difference in consideration it shall be decided by arbitration."

The wajib-ul-arz of 1863 was signed by all the sharers and by some, if not all, of the mortgagees.

The corresponding clause in the wajib-ul-arz of 1870, as translated in the record, is as follows :—

"In future co-sharer, mortgagor or mortgagee has as such power. He shall have power to make transfers first to his own and *ekjaddi* brothers and next to co-sharers in the *khata* and *patti* as well as to proprietors. If none of the aforesaid persons takes he shall have power to transfer it to a stranger. If there arises any dispute as regards the price being more or less it shall be decided by arbitration."

In paragraph 14 of the wajib-ul-arz of 1870 it is expressly stated, "Custom as to pre-emption—Pre-emption is allowed." There can be no possible doubt that the clauses to which their Lordships have referred set out what the sharers in mauza Pala Kher had in 1863 and in 1870 agreed to be the custom of pre-emption in the mauza. It is to be presumed, as the contrary has not been shown, that the wajib-ul-arz of 1863 and the wajib-ul-arz of 1870 had been properly prepared in accordance

with the law then in force, and with the "Directions for Revenue Officers in the North-Western Provinces of the Bengal Presidency," which had been promulgated under the authority of the Lieutenant-Governor of those provinces.

The references in the clauses above mentioned to mortgagors and mortgagees are obscure. The sharers in mauza Pala Kher may have intended that if a mortgagor should assign his interest as a mortgagor he should offer it in the first instance to his own or his *ekjaddi* brother and then to a sharer in the *khata* and *patti*, or to a proprietor in the mauza, and if they should refuse to purchase it he might assign it to a stranger, and in the same way if a mortgagee should wish to assign his mortgagee's interest his right to assign it should be similarly limited. In their Lordships' opinion it was not meant by the clauses to which they have referred to treat mortgagees as such as sharers in the mauza and to confer on them a right to pre-empt.

Having regard to some of the decisions of the High Court of Allahabad, which have been referred to in the arguments in this appeal, it is unfortunate that the record which is before this Board does not show what was the vernacular word in the wajib-ul-arzes of 1863 and 1870, which has been translated as 'co-sharer,' or what was the vernacular word in the wajib-ul-arz of 1863 which has been translated as 'village.'

The wajib-ul-arz of 1863 contained a clause as to partition which, as translated in the record, was as follows :—

"7. Partition, separate and compact.

"Every one can get his property partitioned to the extent of his share. And, if the area be compact, he can also get a separate *mahal* formed. If at the time of partition the grove of one person comes to be included in the lot of another, the planter of the grove shall remain in possession as before, but the planter shall (have to) give land of the same quality in exchange. As to a well, the costs of construction shall be given to the person who constructed it. If the *khudkasht* land of one person comes into the possession of another, then he (the person in possession) shall relinquish it of his own accord or shall pay rent as a tenant."

It appears to their Lordships that it may reasonably be inferred from this clause that the sharers of 1863 in mauza Pala Kher not only contemplated that the mauza might subsequently be partitioned into separate mahals, but also intended

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that on a partition off from the mauza of a separate mahal, the sharers in the other mahals or in the unpartitioned portion of mauza Pala Kher should as such have no share or other proprietary interest in the separated mahal. It does not appear from the extracts from the wajib-ul-arz of 1870 which are printed in the record whether the wajib-ul-arz of 1870 contained a similar clause, but it probably did.

It appears from the *rubkar* of the 5th of December, 1902, which was drawn up for the carrying out by the *Amin* of the partition of mauza Pala Kher that the partition should be a perfect partition; that a grove should be allotted to the mahal of the person who had planted it; and that a Muhammadan tomb, which stood in the *abadi*, should be allotted to the share of the Muhammadans.

The Subordinate Judge of Aligarh found that a custom of pre-emption prevails in mauza Pala Kher; that the partition of the mauza and the separation of the plaintiff's Mahal Salig Ram from that of the vendor did not affect the custom of pre-emption; and that the plaintiff, the appellant here, had a right to pre-empt as against the vendee, the respondent here; and on the 28th of March, 1911, he gave the appellant a decree for pre-emption. From that decree Kunwar Ahmad Sayed Khan, the respondent here, appealed to the High Court of Judicature at Allahabad.

The Chief Justice and Mr. Justice Tudball, before whom the appeal came for hearing, allowed the appeal and dismissed the suit. From the decree of the High Court this appeal has been brought.

Pre-emption in village communities in British India had its origin in the Muhammadan law as to pre-emption, and was apparently unknown in India before the time of the Moghul rulers. In the course of time customs of pre-emption grew up or were adopted among village communities. In some cases the sharers in a village adopted or followed the rules of the Muhammadan law of pre-emption, and in such cases the custom of the village follows the rules of the Muhammadan law of pre-emption. In other cases, where a custom of pre-emption exists, each village community has a custom of pre-emption which varies from the Muhammadan law of pre-emption and is peculiar to

the village in its provisions and its incidents. A custom of pre-emption was doubtless in all cases the result of agreement amongst the share-holders of the particular village, and may have been adopted in modern times and in villages which were first constituted in modern times. Rights of pre-emption have in some provinces been given by Acts of the Indian Legislature. Rights of pre-emption have also been created by contract between the sharers in a village. But in all cases the object is, as far as is possible, to prevent strangers to a village from becoming sharers in the village. Rights of pre-emption, when they exist, are valuable rights, and when they depend upon a custom or upon a contract, the custom or the contract, as the case may be, must, if disputed, be proved.

The only evidence in this case to prove that the custom, which is relied upon by the appellant, existed in mauza Pala Khor, is afforded by the clauses relating to pre-emption which are contained in the wajib-ul-arzes of 1863 and 1870. These clauses do, in the opinion of their Lordships, prove that prior to the partition of mauza Pala Kher the custom of pre-emption, which is set out in the second paragraph of clause 2 of the plaint existed and was in force in mauza Pala Kher, but that would not be sufficient to entitle the appellant to a decree. It would be necessary for him to show, either on the construction of the wajib-ul-arzes or by other evidence, that the custom of pre-emption which obtained in the unpartitioned mauza Pala Kher would survive a partition of that mauza into separate mahals so as to give a sharer in one of the new mahals a right to pre-empt property in another of those mahals in which he was not a sharer at the date of the sale.

This question was very carefully considered by a Full Bench of the Allahabad High Court in *Dalganjan Singh* v. *Kalka Singh* (1), in which Sir ARTHUR STRACHEY, C. J., and MR. JUSTICE BANERJI, considered that the question in each case is that of the construction of the nature of the particular custom on which the claim for pre-emption is based, and whether the custom can apply to the altered state of things which comes into existence when a perfect partition has been effected. In that case, as in this, no

(1) (1899) I. L. R., 22 All., 1.

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new wajib-ul-arz was framed on the partition. Their Lordships are not prepared to dissent from the view of MR. JUSTICE BANERJI in the case which has been referred to, that "where a fresh wajib-ul-arz has not been prepared at partition, it does not follow, as a matter of law or principle, that the custom or contract in force before partition is no longer to have effect or operation." The question must depend upon the circumstances of each case and the inferences which may legitimately be drawn from the evidence. In the present case their Lordships cannot overlook the fact that in 1863 all the sharers in mauza Pala Kher were Muhammadans; that Hindus were obtaining interests in the mauza as mortgagees; and that the sharers in 1863 were contemplating that the mauza might be partitioned. The right to obtain perfect partition, of course, existed. Nor can their Lordships overlook the fact that in 1905, when perfect partition was applied for, Hindus had become sharers in mauza Pala Kher, and that nothing was done on partition to provide that sharers in one mahal should have a right of pre-emption in respect of a sale in another mahal in which they were not sharers. Their Lordships are unable to draw the inference from the wajib-ul-arzes and the circumstances in this case that it was intended that, in case of a perfect partition of mauza Pala Kher, a sharer in one mahal should have a right of pre-emption in another mahal in which he was not a sharer.

The learned judges who decided the appeal in this case in the High Court apparently considered that the evidence afforded by the wajib-ul-arzes of 1863 and 1870 did not prove any custom of pre-emption, and each of them also relied upon the fact that no evidence that the right of pre-emption has been exercised was given. The learned Chief Justice also apparently suggested doubts as to the value of a wajib-ul-arz as evidence of a custom of pre-emption when unsupported by evidence that the custom had been enforced. As their Lordships have already intimated, they have no doubt that the clauses relating to transfers of shares in the wajib-ul-arzes of 1863 and 1870 stated what the sharers in 1863 and the sharers in 1870 had agreed was the custom of pre-emption in mauza Pala Kher. These clauses were inartistically drafted. The Kânungo or other official who collected

information from the sharers in the mauza may have been a person who was as ignorant as they were of legal forms and legal phraseology, but before the wajib-ul-arzes were signed by the sharers or sanctioned by the settlement officer the sharers had an opportunity of objecting to any statements contained in them which they did not understand or did not consider to be correct. Pre-emption was a matter in which all the sharers were interested; it was a matter as to which they could agree as to what the custom in their mauza was. Pre-emption, with various incidents, limitations and restrictions, prevails by custom or by special agreement amongst share-holders in very many, if not in most or all, of the village communities in the province in which mauza Pala Kher is situate.

In agreeing as to the custom of pre-emption which should be inserted in the wajib-ul-arzes the sharers were not trying to establish any rule of inheritance in the mauza inconsistent with the Muhammadan or the Hindu Law of Inheritance, and their Lordships fail to see on what principle statements in a wajib-ul-arz as to rights of pre-emption, which are not in contravention of Muhammadan, Hindu, or other law, should not be considered as reliable evidence of a custom of pre-emption. To hold that a wajib-ul-arz is not by itself good *primâ facie* evidence of a custom of pre-emption which is stated in it and that the wajib-ul-arz requires to be corroborated by evidence of instances in which the custom has been enforced would be to increase the costs of litigation in pre-emption cases, and in many cases might practically deprive a sharer of his right. Of course the evidence as to a custom of pre-emption afforded by a wajib-ul-arz may be rebutted by other evidence.

The appellant has failed to prove that he is entitled to a decree. Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitor for the respondent: *Douglas Grant.*

J. V. W.

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December, 3.

APPELLATE CIVIL.

Before Mr. Justice Chamier and Mr. Justice Piggott.

ABDUL HAQ AND ANOTHER (DEFENDANTS) *v.* DATTI LAL AND ANOTHER (PLAINTIFFS).*

Act No. IV of 1882 (Transfer of Property Act), section 108 (j)—Lessee or licensee—Agricultural land let for building purposes under special agreement and afterwards included in neighbouring town.

Some fifty years ago, by an arrangement between the Government, the zamindars and certain butchers, a certain area of cultivated land adjoining the city of Allahabad was let in plots to the butchers for building purposes at a uniform rent of Rs. 10 per bigha. There was also a proviso against arbitrary enhancement of the rent. Subsequently, the land upon which the butchers had settled was included in the municipal limits of the city of Allahabad, and was called muhalla Atala.

One of the butchers having sold his house, the zamindars sued him and his vendee under the terms of the wajib-ul-arz claiming either one fourth of the price, or, in the alternative, that the site might be cleared and possession made over to them.

Held that in the circumstances these sites were not subject to the ordinary law with reference to village sites occupied by agricultural tenants, but the butchers must be taken to be lessees, and in the absence of a contract to the contrary their rights as such were transferable without reference to the zamindars.

OVER fifty years ago a tract of cultivated land in mauza Atarsuiya, a village adjoining the city of Allahabad, was set apart by arrangement with the proprietors and with the Local Government for the establishment of a colony for the butchers of the city. The butchers settled on the land and built houses thereon. A rent of Rs. 10 per bigha was to be paid by the settlers to the zamindars and this rate of rent was not to be altered except "by orders of the proper authorities." In course of time this land came to be included within the municipal limits of the city of Allahabad and was designated "muhalla Atala." The land, however, continued to form part of mauza Atarsuiya and was treated as such at the partition by the Revenue Court of the mauza in 1902 into three mahals. The plaintiffs are the proprietors of one of the mahals.

*Second Appeal No. 1568 of 1913, from a decree of Ram Chandra Chaudhri, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, of Allahabad, dated the 30th of June, 1913, confirming a decree of Rup Kishan Aga, Munsif of Allahabad, dated the 23rd of January, 1912.

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The wajib-ul-arz of the mauza prepared in 1875 contained the following provision:—"*Jis qadar kashtkaran bahir hadd shahr ke abad hain unko farokht amla mukan ba adae qimat woh chaharum zamindar ke hasil hai . . . Aur kashtkaran bashindagan shahr ko ikhtiar bai woh rehan mai zamin mukan bila ijazat zamindar hasil hai.*" (Agricultural tenants residing outside the limits of the town are entitled to sell the materials of houses after payment to the zamindar of one fourth of the sale price . . . And agricultural tenants who are residents of the town are entitled to sell and mortgage houses together with the sites without the consent of the zamindar.)

In September, 1910, one Abdul Haq, a butcher resident of the said muhalla Atala, sold his house. Thereupon the plaintiffs within whose mahal the site of the house was situate brought this suit against the vendor and the vendee for the recovery of one fourth of the sale price or, in the alternative, for possession of the site after removal by the defendants of the materials of the house. The defendants set up an absolute right of alienation and denied that the plaintiffs had any other rights than that of realizing the rent of Rs. 10 per bigha. Both the lower courts found that the house was situate in what was called in the wajib-ul-arz of 1875 the "*abadi bahir hadd shahr.*" They refused to grant the first relief, holding that the word "*kashtkaran*" in the wajib-ul-arz referred only to agricultural tenants. They decreed the second or alternative relief. The defendants appealed to the High Court. The plaintiffs had filed a cross-objection in the lower appellate court against the dismissal of the first relief, but none in the High Court.

Mr. *B. E. O'Conor*, (with him Mr. *Zahur Ahmad*), for the appellants.

Accepting the finding of the lower court that the house is in the *abadi* outside the limits of the town, the incidents and the presumption applicable to tenants' houses in an ordinary agricultural village do not apply to this case. At the outset it is not correct to say that there is any universal law that in every case of an agricultural village a tenant can have no saleable interest in his house. That depends upon the particular circumstances of each case. An example is furnished in the case

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of *Incha Ram* v. *Bande Ali* (1). The presumption weakens when the village is merging into a town. The reason for the general rule as laid down in the case of *Sri Girdhariji Maharaj* v. *Chote Lal* (2) does not exist here. That rule applies to the case of agricultural tenants who "for purposes of cultivation" are permitted by the zamindar to build houses. The present case is one of deliberate transplanting of a large non-agricultural community from the town to a portion of the adjoining village. Here, agricultural land was taken up and given to non-agriculturists (butchers) for an avowedly non-agricultural purpose, namely, building houses; and a special and *quasi*-permanent rate of ground rent was taken. These butchers are not mere licensees; they pay a substantial ground rent and they cannot be turned out so long as they continue to pay the rent. Their status is that of lessees, and as such they can transfer their houses. The reported decisions against the right of tenants of agricultural villages to transfer their houses are cases dealing with mere licensees paying no ground rent. Under these circumstances and in the absence of anything in the wajib-ul-arz in derogation of a right to transfer houses of non-agriculturists the lower courts were not justified in relying upon any presumption against such a right.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondents.

On the question of the status of these tenants, the mere payment of ground rent by them would not make them lessees. For example, a man who pays rent for a shop in a market is not a lessee of the site. The distinction between a licensee and a lessee is not the payment or non-payment of rent but the presence or absence of some right or interest in the land. It has not been shown that any interest in the land itself was ever conveyed to or acquired by these tenants. Mere permission to occupy the land, although such permission may have been given for some valuable consideration, would not make them more than licensees. It may be that the zamindars cannot now turn them out at their will, but that furnishes no test as to the status of these tenants: for even a licence cannot be revoked by the grantor where the licensee acting upon the licence has executed at his own expense

(1) (1911) I. L. R., 33 All., 757. (2) (1898) I. L. R., 20 All., 248.

buildings of a permanent character. Even supposing that they are lessees, *there is no presumption in law that they have acquired* transferable rights. Such rights do not arise independently of the terms of the lease itself. The Transfer of Property Act does *not apply to* leases of agricultural lands in villages. The inclusion of the land within the municipal limits of the town of Allahabad cannot in any way affect the rights of the proprietor of that land; and upon the findings of the lower courts the general law of the province, as laid down and recognized in the following cases, applies:—*Sri Girdhariji Maharaj* v. *Chote Lal* (1), *Muhammad Usman* v. *Babu* (2), *Ram Bilas* v. *Lal Bahadur* (3), *Chajju Singh* v. *Kanhia* (4), *Raj Narain Mittar* v. *Budh Sen* (5) and *Fateh Chand* v. *Kishan Kunwar* (6).

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In this respect there is no distinction between agriculturist and non-agriculturist tenants of a village; they stand on the same footing. If, however, in the opinion of the court the plaintiffs be not entitled to the relief as to possession of the site then the alternative relief as to one fourth of the price should be given to them. The word "*kashtkars*" in paragraph 3 of the wajib-ul-arz is not intended to be confined to agricultural tenants only. The butchers come within it. The lower appellate court has not properly gone into the question of our claim as to *chaharum*.

Mr. *B. E. O'Conor*, replied.

PIGGOTT, J.—In this case the plaintiffs are the proprietors of a mahal in village Atarsuiya situated on the outskirts of the city of Allahabad. The second defendant, being the owner of a house situated in the plaintiff's mahal, has executed a deed of sale transferring the same to the first defendant. In the suit as originally framed the plaintiffs simply claimed one fourth of the sale price, on the basis of their alleged customary rights as proprietors of the soil. The plaint was subsequently amended so as to claim another relief in the alternative. This was that the defendants should be ordered to remove the materials of the house within a time to be fixed by the court and that the plaintiffs should thereupon "be put in proprietary possession of the site in question together with the *kachcha*-built walls." I think it

(1) (1893) I. L. R., 20 All., 248.
(2) (1910) 8 A. L.J., 61 (63).
(3) (1908) I. L. R., 30 All., 311.
(4) Weekly Notes, 1881, p. 114.
(5) (1904) I. L. R., 27 All., 838.
(6) (1912) I. L. R., 34 All., 579.

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recognized a right on the part of the zamindars to receive one fourth of the price, on sales of houses situated in that portion of the abadi not within the limits of Allahabad city, referred only to agricultural tenants, to which class the second defendant does not belong. On these findings he dimissed the claim for one fourth of sale price, but decreed the alternative claim for possession of the site after removal of the materials. The defendants appealed, and the plaintiffs filed cross-objections with regard to the dismissal of their claim for one fourth of the sale price. What they meant by this I find it a little difficult to understand. The plaint makes it perfectly clear that the two reliefs were claimed in the alternative. Even if it could be successfully contended on the evidence that the plaintiffs were entitled both to possession of the site after removal of the materials and also to one fourth of the sale price, it would be a complete answer that no such case was set up in the plaint. The lower appellate court in the first intance sent down certain issues for specific findings. Two of these issues relate to a very doubtful plea set up by the defendants, a plea not really consistent with other admissions in their written statement, that the land in suit had been granted to the predecessors in title of defendant No. 2 by the Government, and not by the zamindars of village Atarsuiya. In any case this point is now concluded against the defendants by an express finding of fact and was not pressed before us. The third issue remitted was in the following terms:—

"Is the land in suit in the *abadi* of village Atarsuiya or in the *abadi* which is called in wajib-ul-arz as *shahr* ?"

On this issue there was a finding in favour of the plaintiffs, which as been finally endorsed by the lower appellate court.

The form of the issue requires to be correctly appreciated. It refers to the wajib-ul-arz for village Atarsuiya prepared at the settlement of 1875 A. D. This document draws a distinction between that portion of the village area which is situated within the limits of Allahabad city and the portion outside those limits. Tenants residing within the city are recognized as having a right of transfer in respect of their houses "along with the sites," without reference to the zamindars. Tenants residing outside the limits of the city may sell the materials of their houses after paying

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one fourth of the sale price to the zamindars. The finding of the lower appellate court is that the land in suit is situated outside the limits of the city, as those limits were understood when the settlement record of 1875 was drawn up. I think it would be easy to criticise the reasons given for this finding. The learned Subordinate Judge has regarded it as decisive that the site of the house in suit can be shown to have been cultivated land at the previous settlement of 1839, and that it was part of the area dealt with at the last partition of village Atarsuiya. The latter circumstance is of no weight, unless and until it be further shown that the village area recognized as within the city limits at the settlement of 1875 was not also formally apportioned between the various new *mahals* formed at the last partition. The former seems to me of very slight weight. I think, however, that I am bound to treat the finding as one of fact and to decline to reconsider it in second appeal. I cannot stretch the finding beyond the ground actually covered by it. We were asked to accept it as a finding of a fact that the land in suit must be regarded as situated in a purely agricultural village, and therefore subject to all the presumptions of law which have been laid down, in various published decisions of this Court, as applicable to the sites of houses so situated. An issue of this sort has always been regarded in this Court as a mixed question of fact and of law. It is necessary to examine the facts actually found by the court below, and then to consider whether these justify the conclusions of law upon which the decision of that court is based.

There is, as both the courts below have recognized, another portion of the wajib-ul-arz of 1875 which has an important bearing on the question in issue. In the eighth paragraph of that record reference is made to the butchers' quarter (*abadi qassaban*) in respect of which it is recorded that, inasmuch as the butchers were permitted to build upon land which had been under cultivation at the previous settlement of 1839, they paid rent for the sites of their houses at a uniform rate of Rs. 10 per bigha, which rent could not be reduced and was not liable to enhancement, except by order of some competent authority or court. This entry requires to be considered in connection with other evidence on the record, not perhaps of great value in itself, but important

as explaining the formation of this "butcher's quarter" in village Atarsuiya. The following facts seem to have been treated by the lower appellate court as substantially established; they were not questioned in argument before us, and I think I am justified in treating them as established without discussing the precise evidence on which they rest. Some time shortly after the mutiny of 1857, the estates of one or more co-sharers in village Atarsuiya were confiscated by Government, on account of the disloyalty of the proprietors. The Government was, therefore, for a time a co-sharer in village Atarsuiya. At about the same time a question arose as to the advisability of settling the butchers of Allahabad in some convenient locality on the outskirts of the city. Negotiations must have taken place between the local land-holders, the butchers and the Local Government, the latter probably acting both in its executive capacity and as one of the co-sharers in the village. The result was the arrangement referred to in the eighth paragraph of the wajib-ul-arz of 1875. A certain area previously under cultivation was given up by the proprietary body for the formation of the new "*abadi qassaban.*" The butchers no doubt built their own houses. They covenanted to pay a ground rent, Rs. 10 per bigha, to the proprietors of the soil. This seems to be a substantial rent; I notice that the learned Munsif was of opinion that it is considerably in excess of anything the proprietors could hope to obtain even now by letting this land for agricultural purposes. There was a covenant securing the permanence of this rate of rent; unless it should be lowered or enhanced by some competent authority. This last expression is no doubt somewhat vague; but it is impossible to interpret it as anything but a stipulation against arbitrary enhancement at the will and pleasure of the proprietors. The "*abadi qassaban*" thus formed is what is now known as the Atala Mohalla of Allahabad city, referred to in the plaint as the residence of defendant No. 2. It has long since been included within municipal limits.

Taking these as the facts of the case, it seems to me idle to enter into a discussion of the principles involved in a series of decided cases of this Court which deal with the respective rights of proprietors of the soil and occupants of houses in purely agricultural villages. I accept, as already remarked, the finding of

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the court below that the wajib-ul-arz of 1875 did not intend to include this butcher's quarter within the limits of Allahabad city—the "*abadi shahr*" as it then stood. Even so, it seems to me decidedly questionable whether a court would be justified in applying to an area with such a history as the above the principles laid down for house sites in purely agricultural villages. The decisions of this Court on which the plaintiffs respondents rely all proceed on the assumption that, in the ordinary case of occupiers of house sites in agricultural villages, there is no definite information forthcoming as to the circumstances under which the site came to be occupied. If the occupiers of houses in such villages were to be treated, in the absence of positive evidence to the contrary, as mere squatters, it would necessarily follow that twelve years' occupation would give them an adverse title to the house sites as against the proprietors of the village. It was felt that this would be monstrous, and would lead to all sorts of undesirable consequences. The only alternative was to regard the occupiers of houses in such villages as a peculiar kind of licensees, applying to their case certain presumptions of law which could be based upon general and well-established custom. Now the tenure of a licensee is in its essence non-transferable; and the records of rights in thousands of villages in all parts of the Province could be referred to in support of the proposition that the right of residence enjoyed by the occupiers of houses in ordinary village sites was everywhere regarded as a right, heritable no doubt, but not transferable.

In the present case we have fairly definite information as to the circumstances under which the predecessors in interest of the second defendant came to occupy this site. The whole transaction by which this "*abadi qassaban*" in village Atarsuiya came to be created amounts on the face of it to a letting of the soil on building-leases at a uniform ground rent, with a stipulation against arbitrary enhancement at the pleasure of the proprietors. The contract is essentially one of lease; and the rights of a lessee, in the absence of express stipulation to the contrary, are in themselves transferable, *vide* the Transfer of Property Act (No. IV of 1882), section 108 (*j*). The only real question to my mind is whether a stipulation to the contrary can be inferred from the

evidence before us. I do not think so. Even the plaint in this case, as originally drafted, shows that the plaintiffs at first desired to bring their suit within the scope of the provision in the wajib-ul-arz of 1875, which gives to tenants residing outside the city limits a right of transfer, subject to payment of one fourth of the sale price to the proprietors of the soil. It was evidently after the plaint had been filed that a difficulty was felt by reason of the fact that this passage of the record of rights refers to "*kasht-karan*," a word which as it stands must be rendered "cultivating tenants." The plaintiffs then amended their claim so as to ask for alternative reliefs. They said, in effect:—"The second defendant is either a *kashtkar* in the sense in which this expression is used in the third paragraph of the wajib-ul-arz, or he *is not*. If he is, he can transfer his house with the right of residence therein, but he must pay us one fourth of the sale price: if he is not, he has no right of transfer at all, and we claim forfeiture and possession of the soil, after the purchaser has removed the materials of the house." It was only when they filed their objections in the lower appellate court that the plaintiffs for the first time suggested that the clause of the wajib-ul-arz in question must be interpreted as meaning that a *kashtkar* residing outside the limits of the *abadi shahr* can only transfer the materials of his house without any right of residence in the house thus transferred, and even then must pay one fourth of the sale price to the proprietors of the soil. The lower appellate court has very properly ignored this plea. Having come to the conclusion that the second of two alternative reliefs must be decreed, the learned Subordinate Judge contented himself with remarking that the question of the plaintiff's right to the first relief did not arise. I note this point because I have felt some difficulty about the present position of the plaintiffs with regard to this first relief. They have filed no cross-objections in this Court, and are obviously precluded from claiming that both reliefs ought to have been decreed. Can they ask this Court to consider their claim to the first relief asked for, in the event of the Court's holding them disentitled to the second? I incline to the opinion that it is open to them to do so. The conclusion I come to on this point is that the plaintiffs have an arguable case, but one which ought

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not to be accepted on the record as it stands. If the suit had gone to trial on the plaint as originally framed and upon issues arising only in respect of the claim for one fourth of the sale price, I think it just possible that the courts might have come to the conclusion that the word *kashtkaran* in this particular passage of the wajib-ul-arz was not used in its strict sense of "cultivating tenants," but was intended to apply to all occupiers of houses situated outside the limits of the "*abadi shahr*." As the case now stands, the question is much complicated by the fact that the plaintiffs have succeeded in the courts below upon a precisely opposite contention, namely, that the second defendant and the other butchers residing in the "*abadi qassaban*" are not *kashtkars* within the meaning of the wajib-ul-arz. If the second defendant, as lessee of the land in suit, has in fact a transferable right in respect of the house in suit and the right of residence therein, it is for the plaintiffs to satisfy the Court that this right is subject to a provision entitling the ground landlords to claim one fourth of the sale price on each transfer. The case in favour of a loose interpretation of the word "*kashtkaran*" is partly rebutted by the proof on the part of the defendants of several instances of transfers in which no claim seems to have been preferred by the landholders to any portion of the sale price. On the record as it stands I am not prepared to dissent from the finding of the first court that this particular provision of the wajib-ul-arz refers to "cultivating tenants" only, and does not affect the rights of the butchers occupying houses in the "*abadi qassaban*."

The rights of these butchers are in my opinion those of lessees holding under building leases, and in the absence of evidence to the contrary, they must be held entitled to transfer their rights as such lessees.

I would therefore set aside the decrees of both the courts below and dismiss this suit with costs in all courts.

CHAMIER, J.—I agree.

BY THE COURT:—The appeal is allowed. The decrees of both the courts below are set aside and the plaintiffs' suit is dismissed with costs throughout.

Appeal allowed.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

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December, 17.

T. C. MUKERJI (PLAINTIFF) v. AFZAL BEG AND OTHERS (DEFENDANTS).*

Joint property—Partition—Infructuous suit for partition no bar to a second suit for the same purpose.

In the year 1905 the plaintiff brought a suit for partition of a house held in joint tenancy. The suit was compromised, the defendant agreeing to transfer his rights to the plaintiff for a consideration, and was accordingly dismissed. The compromise, however, was not given effect to, and thereafter the plaintiff brought a second suit for partition. *Held*, that as soon as the defendant failed to carry out the compromise, the parties were relegated to their rights as they existed prior to the compromise. The right to bring a suit for partition, unlike other suits, is a continuing right incidental to the ownership of joint property and the second suit was, therefore, not barred.

Nasrat-ullah v. *Mujib-ullah* (1), *Bisheshar Das* v. *Ram Prasad* (2) and *Madan Mohan Mondul* v. *Baikanta Nath Mondul* (3) followed. *Gulkandi Lal* v. *Manni Lal* (4) not followed.

THE facts of this case were as follows:—

The plaintiff and the defendants were owners of a house to the extent of ¾ and ¼ respectively, situated on the Rajpur Road, Dehra Dun. In 1905 the plaintiff had brought a suit for partition of his share of the house against the predecessor in title of the defendants. During the pendency of that suit the parties thereto entered into a compromise whereby the then defendant agreed to convey his share to the plaintiff for Rs. 5,750. The agreement was as follows:—"It has been agreed between the parties that the defendant Mirza Karim Beg should transfer all the interest and rights he has or he can acquire in the property in dispute to the plaintiff Babu Tara Chand under a sale deed; that Babu Tara Chand shall pay Rs. 5,750, to the defendant Mirza Karim Beg as compensation, and that the expenses incurred in connection with the sale deed shall be borne by the plaintiff Babu Tara Chand. Dated, Dehra Dun, the 11th November, 1905." On the same day the parties intimated to the court that the suit might be disposed of in terms of the compromise, and the court dismissed the suit accordingly. The order of the court ran as follows:—"The parties have executed an agreement by which defendant agrees to transfer to plaintiff all

* First Appeal No. 145 of 1913, from a decree of C. H. B. Kendall, Subordinate Judge of Dehra Dun, dated the 19th of February, 1913.

(1) (1891) I. L. R., 13 All., 309. (3) (1906) 10 C. W. N., 639.
(2) (1906) I. L. R., 28 All., 627. (4) (1901) I. L. R., 23 All., 219.

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his rights and title in the property in dispute, and they ask accordingly that the suit be dismissed. Parties to bear their own costs. Suit therefore dismissed." The order is also dated the 11th of November, 1905. Mirza Karim Beg died in August, 1906, without having carried into effect the aforesaid agreement, although he was repeatedly asked to do so. His successors in title were not inclined to carry out the agreement and the plaintiff's efforts in the direction of getting the property "equitably and amicably partitioned" failed, his last request being refused on the 26th of May, 1909. The plaintiff did not desire any longer to hold his share jointly with the defendants, and hence the suit. The defendants contended that the plaintiff was not competent to sue, the former suit having been struck off. The Subordinate Judge held that the proceedings in the former suit were tantamount to a withdrawal of the suit under section 373 of Act XIV of 1882 (corresponding to order XXIII, rule 1, of the present Code of Civil Procedure), and that as no leave was granted for a fresh suit the present suit was barred. He relied on I. L. R., 23 All., 219, and observed:—"But if the compromise does not give the plaintiff any of the reliefs claimed in the suit, but deals with matters not the subject-matter of the suit, no decree can be given, *i. e.*, no substantial decree. On the other hand I see no reason why the provisions of order XXIII, rule 1, of the present Code should not apply, merely because the defendant joined the plaintiff in asking that the suit might be withdrawn. The case quoted by Babu Durga Prasad and reported in I. L. R., Allahabad XXIII, page 219, seems to me to be precisely a similar one. It was a partition suit, both parties applied that the suit might be struck off on a compromise which was not inserted in the decree, and which was never carried out. All these ingredients exist in the present suit." The suit was accordingly dismissed.

Plaintiff appealed.

Dr. *Satish Chandra Banerji*, for the appellant:—

It is submitted that the court below is wrong. It has itself admitted that if the agreement of 1905 was not carried out, the parties were relegated to their original position. Therefore the parties are holding as tenants in common and the property has not changed its character. One of the incidents of joint property is

that it may be partitioned at any time, and the cause of action is a recurring cause of action. It was observed in *Nusrat-ullah* v. *Mujib-ullah* (1):—"So long as the property is jointly held so long does a right to partition continue. When a person having a right to partition and desiring to partition has his right challenged it appears to us he can maintain a suit for a declaration, provided his prior decree is not still enforcible." The same view has been taken in *Bisheshar Das* v. *Ram Prasad* (2) and *Madon Mohon Mondul* v *Baikanta Nath Mondul* (3). The former suit did not decide anything as to the right of the plaintiff to get a partition There is consequently no bar to the present suit. The ruling reported in I. L. R., 23 All., 219, is based on its own facts and is distinguishable There the second suit was precisely the same as the first suit and apparently based on the same cause of action. In that case it could not have been intended to cast any doubt upon the principle laid down in the other two Allahabad cases, for Knox, J., who was a party to that decision, was also a party to the decisions reported in 13 and 28 All.

Maulvi *Iqbal Ahmad*, for the respondents.—

The ruling in 23 All., was on all fours with the facts of the present case and could not be distinguished. The parties in 1905 had come to a mutual agreement, and their rights were confined to carrying into effect of that compromise. It was open to the plaintiff to sue for specific performance within limitation. The parties had agreed to waive their original rights, and to substitute the agreement of 1905 therefor, the plaintiff could not now be allowed to go back upon a contractual engagement, which he had entered into with his eyes open. The law was undisputed, but here the circumstances were different, inasmuch as the parties had agreed to take their rights as defined by the compromise, and it was neither illegal nor opposed to public policy.

Dr. *Satish Chandra Banerji*, was not heard in reply.

RICHARDS, C. J., and BANERJI, J.:—This appeal arises out of a suit for partition of a house. The plaintiff alleged that he was entitled to three fourths of the house whilst the defendants were entitled to one fourth. The court below, without going into the

(1) (1891) I. L. R., 13 All., 309, (313) (2) (1906) I. L. R., 28 All., 677
(3) (1906) 10 C. W. N., 839.

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merits of the case, held that the suit is not maintainable upon the ground that there was a previous suit between the plaintiff and the predecessor in title of the defendants for partition of this very house which was dismissed on the 11th of November, 1905, and the plaintiff did not obtain permission to bring a fresh suit. It appears that when the previous suit was instituted the predecessor in title of the defendants agreed to execute a sale deed to the plaintiff of all his rights in the house for the sum of Rs. 5,750. It is admitted on both sides that this agreement was never carried out. The plaintiff says in his plaint that after repeated attempts to get the sale deed executed the predecessor in title of the defendants refused to execute the sale. We think the decision of the court below was wrong. As soon as the defendants or their predecessor in title failed to carry out the compromise the parties were relegated to their rights as they existed prior to the compromise. The right to bring a suit for partition unlike other suits is a continuing right incidental to the ownership of joint property. It may-be that at one time the desire for partition may cease, circumstances may again occur which make it desirable or necessary that partition should take place. Reliance has been placed by the respondents on the case of *Gulkandi Lal* v. *Manni Lal* (1), where the facts were very similar to the facts of the present case. We find that the question involved had been previously decided in the case of *Nasrat-ullah* v. *Mujib-ullah* (2). This case was followed in the case of *Bisheshar Das* v. *Ram Prasad* (3), one of the learned Judges being the same as had decided the case of *Gulkandi Lal* v. *Manni Lal*. There is a Calcutta ruling to the same effect, *viz*., *Madon Mohon Mondul* v. *Baikanta Nath Mondul* (4).

We may observe that no question of title was determined in the previous litigation and so no question of *res judicata* arises.

We allow the appeal, set aside the decree of the court below and remand the case to that court with directions to re-admit it under the original number on the file, and proceed to hear and determine the same, according to law. The appellant will have his costs of this appeal. Other costs will be costs in the cause.

Appeal decreed and cause remanded.

(1) (1901) I. L. R., 23 All., 219.
(2) (1891) I. L. R., 13 All., 309.
(3) (1906) I. L. R., 28 All., 627.
(4) (1906) 10 C. W. N., 839.

FULL BENCH.

1914
December, 18.

Before Justice Sir George Knox, Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

STAMP REFERENCE BY THE BOARD OF REVENUE*.

Act No. II of 1899 (Indian Stamp Act), section 4—Stamp—Settlement of family property effected by two deeds, one modifying the other—Full duty paid on the first.

Two brothers, having come to an agreement as to the settlement of their joint property, embodied this agreement in a deed which was duly stamped according to the value of the property dealt with thereby. Subsequently the parties to this deed executed a second deed of settlement which modified the provisions of the first in certain directions, but dealt with no property which was not covered by that deed. Both deeds were contingent on the happening of events which at the time of the execution of the second deed were still future events.

Held that the transaction effected by the two deeds fell within the purview of section 4 of the Indian Stamp Act, 1899, and, the full duty having been paid on the first deed, the second required a stamp of one rupee only.

THIS was a reference by the Board of Revenue under section 57(*b*) of the Indian Stamp Act, 1899. The facts which gave rise to the reference were thus stated in the Board's order :—

"On the 2nd of July, 1912, Raja Shambhu Dial and his brother Babu Brij Kishore executed an instrument, setting forth a family arrangement regarding their joint property. The instrument was taken to the Collector of Cawnpore in accordance with the provisions of section 31 of the same Act and was held to be an instrument of partition chargeable with a duty of Rs. 925. This duty was paid. On the 23rd of August, 1912, the two brothers took another instrument before the same Collector for adjudication as to the proper stamp duty to be paid. This instrument provided, *inter alia*, that the original deed of agreement, namely, that of the 2nd of July, 1912, should remain in force after certain alterations entered into later on. Both deeds were to be equally binding. The alterations referred to were (1) some alterations on purely nominal matters which need not be considered ; (2) instead of the sum of Rs. 1,600, fixed for travelling expenses in the deed of prior date the sum of Rs. 1,500 was to be substituted, out of which Rs. 1,000 was to go to Raja Shambhu Dial and Rs. 500, to Babu Brij Kishore ; (3) the sum of Rs. 12,000, assessed value of the house,

*Civil Miscellaneous No. 200 of 1914.

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made over to Babu Brij Kishore without any compensation whatever; (5) Raja Shambhu Dial was to pay in any case the sum of Rs. 3,000, in the marriage ceremony of Babu Brij Kishore's daughter; (6) a garden out of the joint stock was to remain in the sole possession of Raja Shambhu Dial and Rs. 2,300 were to be given to Babu Brij Kishore. The original deed of agreement was to remain in force except so far as the above alterations were concerned. The Board of Revenue considered that the case fell within the principle laid down in the ruling of this Court in Civil Miscellaneous Case No. 79 of 1912 and were of opinion that the latter instrument was a fresh instrument of partition to be stamped ad valorem. We sent for the ruling cited by the Board of Revenue. We are agreed that it has no bearing whatever upon the case before us. The obvious intention of the contracting parties was that the settlement of certain moneys and properties covered by the deed of the 2nd of July, 1912, should be re-adjusted. No new property was introduced into the second deed. Both deeds were contingent upon the coming to pass of other events which were at the time of execution events in the future. The intention was that they were to form and to be regarded as one deed. After carefully considering the language used in both deeds, and remembering always that Act No. II of 1899 is a fiscal enactment and that its provisions should be construed in favour of the subject, we hold that the present case falls within the purview of section 4 of the Act. The principal instrument has been charged with the duty prescribed in schedule I for settlement of property. The latter instrument is chargeable with a duty of one rupee only. A copy of this our judgement under the seal of the court and the signature of the Registrar will be sent to the Chief Controlling Revenue Authority.

1914
December, 19.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

DEO NARAIN SINGH (PLAINTIFF) *v.* GANGA SINGH AND ANOTHER (DEFENDANTS)*

Hindu law—Joint Hindu family—Son's right to dispute alienation made by father—Son conceived but not born at the date of alienation.

Held that a Hindu son is competent to contest an alienation made by the father at a time when the son was in his mother's womb. *Sabapathi* v. *Somasundaram* (1) followed. *Mussamut Goura Chowdhrain* v. *Chummun Chowdry* (2) not followed. *Kalidas* v. *Krishan Das Chandra Das* (3) *Hanmant Ramchandra* v. *Bhimacharya* (4) *Minakshi* v. *Virappa* (5) referred to.

THIS was a suit to set aside an alienation made by the father of the plaintiff on the ground that the father had no right to make it. The defence among others was that the plaintiff was not born at the date of the alienation and could not challenge it. The court of first instance found that the plaintiff was in his mother's womb at the date of the alienation and relying upon *Goura Chaudhrain* v. *Chummun*, and the opinion of Golap Chandra Sarkar, (Hindu Law, page 210, 4th edition) held that the plaintiff could not question the alienation and dismissed the suit. The lower appellate court confirmed the decree. The plaintiff appealed.

Dr. *S. M. Suleman* for the appellant:—

A son is allowed to participate in the ancestral property by the mere fact of his birth. It is submitted that "birth" means conception. A son comes into existence as soon as he is conceived, and from that moment he becomes a member of the family. Conception, therefore, gives him a sufficient right to maintain an action to set aside the father's alienation; *Yekeyamian* v. *Agniswarian* (6); Strange's Hindu Law, 182. The case on which the court of first instance relied (W. R. 1864, page 340) does not lay down correct

*Second Appeal No. 1578 of 1913 from a decree of V. N. Mehta, Subordinate Judge of Jaunpur, dated the 25th of June, 1913, confirming a decree of Kesri Narain Chand, city Munsif of Jaunpur, dated the 31st of March, 1913.

(1) (1882) I. L. R., 16 Mad., 76.
(2) (1864) W. R., Gap No. 340.
(3) (1869) 2 B. L. R., 103, F. B.
(4) (1887) I. L. R., 12 Bom., 105.
(5) (1884) I. L. R., 8 Mad., 89.
(6) (1869) 4 Mad. H. C., Rep., 307.

law; and it has never been followed. The correct law is laid down in *Ramanna* v. *Venkata* (1), *Sabapathi* v. *Somasundaram* (2) *Madho Singh* v. *Hurmut Ally*, (3) *Jado Singh* v. *Mussumat Ranee* (4) and *Tulshi Ram* v. *Babu* (5). Reference was also made to Mayne, 449, Trevelyan, 291. The passage in Sarkar's Hindu Law does not help the defendants. If it is read in the light of cases cited, it means that a son cannot question an alienation unless he is born alive. If he is born alive he has the same right to question an alienation as a son in existence; *Hanmant Ramchandra* v. *Bhimacharya* (6).

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Babu *Durga Charan Banerji*, for the respondents.

The whole question is whether a child in the womb is a child born. The only reason why he is allowed to question an alienation is that he is a co-owner and an alienation cannot be made except with his consent. Is a child in the womb a co-owner on the date of alienation if subsequently born. There is no doubt that in certain cases, e.g., in cases of succession, partition etcetra his rights will date back to the conception if he is born alive. The cases of alienations should be governed by the principles upon which cases of *bonâ fide* purchasers are governed.

Dr. *S. M Suleman*, was heard in reply.

RICHARDS, C. J., and BANERJI, J.—The suit which has given rise to this appeal was brought by the plaintiff appellant for a declaration that a sale-deed, dated the 17th of August, 1909, executed by his father Hansraj Singh in favour of Naurang Singh, the predecessor in title of the defendants, is null and void as against the plaintiff. The validity of the sale is questioned on various grounds. The lower court has dismissed the suit on the finding that the plaintiff was born after the date of the sale and is not, therefore, entitled to question its validity. It has further been found that the plaintiff was in his mother's womb when the sale was made, and it is not disputed for the purposes of this appeal that the property sold is ancestral property. The question to be determined in this appeal is whether a son who was in his mother's womb at the date of an alienation by the father, of

(1) (1887) I. L. R., 11 Mad., 246.
(2) (1892) I. L. R., 16 Mad., 76.
(3) N.-W. P., H. C. Rep., 432.
(4) (1873) N.-W. P., H. C. Rep., 113.
(5) (1911) I. L. R., 33 All., 654.
(6) (1878) I. L. R., 12 Bom., 105.

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ancestral property can contest the alienation. The decision of this question depends on the further question whether a son in the mother's womb can be deemed to be a co-owner of joint ancestral property.

Under the *Mitakshara* a son acquires an interest in ancestral property by birth, the reason for the rule being, as pointed out by Mr. Golap Chandra Sarkar in his Work on Hindu Law, page 210, 4th edition, that the father and other ancestors are reproduced in the son. The question is whether birth relates back to the period when the child was in its mother's womb. Under other systems of law, such as the Civil Law and the English Law, a child is deemed for some purposes to be born when it is in its mother's womb. This rule is in several instances recognized by the Hindu law. In the case of succession by a posthumous son he takes a share in his father's property from the date of his father's death, and he is regarded as being in existence though he is only in his mother's womb and not actually born until afterwards. Again, in the case of partition, a son *in utero* at the time of partition is deemed to be in existence and the partition may either be postponed or a share should be set apart for him. (See Strange's Hindu law, page 182, Jolly's Tagore Law Lectures, page 132, *Kalidas Das* v. *Krishan Chandra Das* (1); Mayne's Hindu Law, section 472, 7th edition). It has also been held that the "rights of a son in the womb could not be defeated by a will made by the father." *Hanmant Ramchandra* v. *Bhimacharya* (2) and *Minakshi* v. *Virappa* (3). So that, in the cases of succession, partition and will, a son in the womb has been regarded as one *in esse*. There is nothing to show that in the case of an alienation by sale a different rule obtains. Our attention has not been called to any text of Hindu Law in which an alienation has been excluded from what is deemed to be the general rule. The courts below have relied on a passage in Mr. Golap Chandra Sarkar's Hindu Law, page 210, 4th edition, which is as follows:—"A child in the womb is not entitled to all the rights of a child *in esse*. A son's right of prohibiting an unauthorized alienation by the father, of ancestral property cannot be exercised in favour of an

(1) (1869) 2 B. L. R., 103, F. B.

(2) (1887) I. L. R., 12 Bom., 105.

(3) (1884) I. L. R., 8 Mad., 89.

unborn son." The learned author has referred to the case of *Mussamut Goura Chowdhrain* v. *Chummun Chowdry* (1) as an authority for the proposition laid down by him. That case no doubt supports his view, but it was dissented from by the Madras High Court in *Sabapathi* v. *Somasundram* (2). The learned Judges held that "an alienation by a Hindu to a *bonâ fide* purchaser for value is liable to be set aside by a son who was in his mother's womb at the time of the alienation." In the recent case of *Sri Datla Venkata Subba Raju Garu* v. *Gatham Venkatrayudu* (3), the same court assumed that a son could contest an alienation made by his father at a time when the son was in his mother's womb. The same view appears to have been adopted by the Bombay High Court. (See West and Buhler's Hindu Law, page 803). We agree with this view. Both on authority and on principle we are of opinion that a son subsequently born alive is competent to contest an alienation made by the father when the son was in the womb. The court below was, therefore, wrong in dismissing the suit on the ground on which it dismissed it. We allow the appeal, set aside the decree of the court below and remand the case to that court with directions to re-admit it under its original number in the register and dispose of the other questions which arise in the case. Costs here and hitherto will be costs in the cause.

Appeal decreed and cause remanded.

FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Justice Sir Pramada Charan Banerji and Mr Justice Tudball

1915
January, 11.

LAL BAHADUR SINGH (DEFENDANT) v. ABHARAN SINGH AND OTHERS (PLAINTIFFS)*.

Act No. IV of 1882 (Transfer of Property Act), section 99—Sale of mortgaged property in contravention of terms of section—Right of representatives of mortgagor to redeem.

If a mortgagee brings the mortgaged property to sale in contravention of the provisions of section 99 of the Transfer of Property Act, 1882, such sale is not

*Second Appeal No. 1530 of 1913, from a decree of B. J. Dalal, District Judge of Benares, dated the 30th of May, 1913, confirming a decree of Partab Singh, Subordinate Judge of Jaunpur, dated the 9th of October, 1912.

(1) (1864) W. R., Gap No. 340. (2) (1893) I. L. R., 16 Mad., 76.

(1914) 27 M. L. J., 580.

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void, but merely voidable. If such a sale is confirmed, the auction purchaser, whether he be an outsider or the mortgagee bidding with the leave of the Court, obtains an indefeasible title, and the right of the mortgagor and those who represent him to redeem is absolutely extinguished.

Tara Chand v. *Imdad Husain* (1); *Muhammad Abdul Rashid Khan* v. *Dilsukh Rai* (2); *Madan Makund Lal* v. *Jamna Kaulapuri* (3) and *Mangli Prasad* v. *Pati Ram* (4) followed. *Jhabba Lal* v. *Chhajju Mal* (5) overruled. *Sardar Singh* v. *Ratan Lal* (6), *Ashutosh Sikdar* v. *Behari Lal Kirtania* (7) and *Pancham Lal Chowdhury* v. *Kishun Porshad Missor* (8) referred to.

THE facts of this case were as follows :—

A usufructuary mortgage of certain property which was zamindari including *sir* land, was executed by Amir Singh and his brother's widow, Dulra, in favour of Rani Dharamraj Kunwar, ancestress of Lal Bahadur Singh, defendant. The mortgagor failed to deliver possession of the *sir* land, and the mortgagee brought a suit and obtained a decree for possession of this land and mense profits and costs. In execution of this decree for mesne profits the decree-holder sold the mortgaged property and purchased it herself on the 20th of August, 1892. The sale was confirmed and the usual certificate granted and the auction purchaser then got possession in 1893. The plaintiffs, who are the grandsons and great grandsons of Amir Singh, were not parties to the decree or the sale held in execution of that decree. They brought the present suit in 1911, alleging that they were still in possession of the property but that the name of the defendant was entered in the revenue papers in 1907, and he had denied their title. They claimed a declaration that the mortgage of 1881 still subsisted and they were entitled to redeem, or in the alternative a declaration that they were exproprietary tenants of the *sir* land sold in execution of the decree against Amir Singh, on the ground that the sale was null and void under the provisions of section 99 of the Transfer of Property Act.

The courts below decreed the suit and granted the first relief asked for in the plaint. The defendant appealed.

Dr. *Satish Chandra Banerji* (with him the Hon'ble Munshi *Gokul Prasad*), for the appellant :—

(1) (1896) I. L. R., 18 All., 325.
(2) (1905) I. L. R., 27 All., 517.
(3) (1898) 2 A. L. J., 123.
(4) (1904) 1 A. L. J., 360.
(5) (1907) 4 A. L. J., 787.
(6) (1914) I. L. R., 36 All., 516.
(7) (1907) I. L. R., 35 Calc., 61.
(8) (1910) 14 C. W. N., 579.

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The main question in this case is whether a sale held in contravention of the provisions of section 99, Transfer of Property Act, is wholly void or only voidable. It is submitted that this section only prescribes a rule of procedure, and as such it has now been transferred, with some modification, to the Code of Civil Procedure. As the sale in this case took place in 1892, the section to be considered is section 99 of Act IV of 1882. That section deals with the execution of a money decree, and does not prohibit such execution completely. It permits attachment, but defers sale till a suit has been instituted under section 67 and a decree obtained. There is no inherent absence of jurisdiction in the execution court, therefore, to hold the sale, and, as the provision is for the benefit only of the mortgagor, the sale, if it takes place, is merely irregular and not a nullity. The Allahabad High Court has consistently held that the sale is only voidable and the mortgagor may object before the sale has been confirmed, but after confirmation the title vests in the auction purchaser (Act XIV of 1882, section 316) and the sale cannot be impugned in the absence of fraud. The first case is *Tara Chand* v. *Imdad Husain* (1). If the sale had been a nullity, the plaintiff there would have had no *locus standi* to sue for partition and the other co-sharer would have succeeded against him. This case was followed in *Mangli Prasad* v. *Pati Ram* (2), *Madan Makund Lal* v. *Jamna Kaulapuri* (3) and *Muhammad Abdul Rashid* v. *Dilsukh Rai* (4). In the last case *Khairajmal* v. *Daim* (5) was referred to. The sale there was prior to the enactment of section 99, but the Privy Council treated it as an irregularity in procedure; *Kishan Lal* v. *Umrao Singh* (6). The only case against this view, is a single Judge decision, *Jhabba Lal* v. *Chajju Mal* (7), which purports to follow *Shib Dass Dass* v. *Kali Kumar Roy* (8), and the Allahabad rulings to the contrary were apparently not cited. The Calcutta High Court has since overruled its earlier decisions and now holds the sale to be merely voidable; *Ashutosh Sikdar* v. *Behari Lal Kirtania* (9). The latest case in our Court, *Sardar Singh* v. *Ratan Lal* (10),

(1) (1896) I. L. R., 18 All., 325.
(2) (1904) 1 A. L. J., 350
(3) (1893) 2 A. L. J., 123.
(4) (1905) I. L. R., 27 All., 517
(5) (1904) I. L. R., 32 Calc., 296.
(6) (1908) I. L. R., 30 All., 143
(7) (1907) 4 A. L. J., 787.
(8) (1903) I. L. R., 30 Calc., 433.
(9) (1907) I. L. R., 35 Calc., 61.
(10) (1914) I. L. R., 33 All., 516.

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does not hold the sale to be void, but proceeds upon the theory that a mortgagee cannot divest himself of his obligation to be redeemed. But the Privy Council has never said that he can in no case acquire an irredeemable title; on the contrary, the position of a mortgagee decree-holder who obtains leave to bid and purchases is exactly the same as that of a stranger auction purchaser. So far as this decision purports to lay down that Hindu sons can redeem after the sale has become unimpeachable against their father, it is in the teeth of a series of cases in this Court. (Here he was stopped.)

Munshi *Haribans Sahai*, for the respondent, divided his argument into three parts, viz., (i) A sale held in contravention of the provisions of section 99, Transfer of Property Act, is null and void. (ii) Even if such a sale be held to be voidable the mortgagee does not thereby acquire an irredeemable title. (iii) In any case the sons of the mortgagor who were no parties to the sale were not bound by it and their right of redemptiou was not destroyed.

As to (i). It was submitted that section 99, Transfer of Property Act, lays down that a mortgagee shall not be entitled to bring the mortgaged property to sale otherwise than by bringing a suit under section 67 of the Act. These are words of prohibition and anything done in disregard of them is done without jurisdiction and is null and void; *Rameshur Singh* v. *Sheodin Singh* (1). It is true that their Lordships of the Privy Council in the case of *Khairajmal* v. *Daim* (2) have held a sale by a mortgagee otherwise than by bringing a suit on his mortgage, to be voidable, but in that case the sale had taken place before the Transfer of Property Act came into force. Moreover, it was a case from Sindh where the Transfer of Property Act did not apply. Their Lordships decided the case upon general principles of equity. There was no question of the construction of section 99, Transfer of Property Act, and no amount of decision on principles of equity could override the express provision of the statute. The Judges in the Full Bench case reported in 35 Calc., 61, committed the initial error of relying upon 32 Calc., 296, in construing section 99 of the Transfer of Property

(1) (1889) I. L. R., 12 All., 510. (2) (1904) I. L. R., 32 Calc., 296.

Act, and their decision therefore is not sound law; *Jhabba Lal* v. *Chajju Mal* (1).

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As to (ii). The observation of MR. JUSTICE MOOKERJEE in 35 Calc., 61, the case of *Khairajmal* v. *Daim* (2), was the most important authority in support of the proposition that even if a sale in contravention of section 99 of the Transfer of Property Act, be only voidable the mortgagee does not thereby acquire an irredeemable title. Reliance was placed upon the observation of their Lordships of the Privy Council at p. 316. It is true that in the case before them their Lordships did not allow the persons who were parties to the sale proceedings to redeem, but the reason for that was given by their Lordships themselves at p. 316. Thus the mortgagor's right of redemption still subsists although the sale may have been confirmed. In the Calcutta case two questions were referred to the Full Bench, viz. (i) "Whether when a sale has been held in contravention of the provisions of section 99 of the Transfer of Property Act, the sale is a nullity or an irregular and voidable sale. (ii). Whether the right of redemption of the mortgagor is or is not affected by such sale."

RAMPINI, A. C. J., whose judgement was concurred in by BRETT MITTRA, and WOODROFFE, J.J., decided only the first point holding the sale to be voidable. As to the second point his Lordship observed: "It seems neither necessary nor advisable for us to answer the second question put by the referring Bench." MR. JUSTICE MOOKERJEE who delivered a separate judgement also left the second point undecided. MR. JUSTICE WOODROFFE in a subsequent case, *Pancham Lal Chowdhury* v. *Kishun Pershad Misser* (3), held that in the Full Bench case the High Court had not decided the question as to whether after the sale the right of redemption was still left to the mortgagor, and sitting with MR. JUSTICE CASPERZ held that a mortgagee by purchasing the property did not acquire an irredeemable title. He became a trustee of the mortgagor who could redeem in spite of the sale having becoming final; *Sardar Singh* v. *Ratan Lal* (4). The cases relied upon by the other side are all distinguishable. The case reported in 18 All., 325, was decided on quite a different point. There the Revenue Court in

(1) (1907) 4 A. L. J., 757.
(2) (1904) I. L. R., 32 Calc., 296.
(3) (1910) 14 C. W. N., 579.
(4) (1914) I. L. R., 36 All., 516.

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execution of a decree for rent had ordered the mortgaged property to be sold holding that section 99 of the Transfer of Property Act had no application to sales held by a Revenue Court. The High Court was of opinion that, inasmuch as the matter was within the exclusive jurisdiction of a Revenue Court, a Civil Court could not question the sale. Another distinguishing feature in that case was that the sale was questioned by "other co-sharers" and their Lordships were of opinion that they had no interest in the share sold and could not therefore contest the sale. In 1 A. L. J., 360, the first court had allowed both the mortgagor and the purchaser to redeem the property and the High Court restored the decree of the first court. Now if after sale no right was left in the mortgagor why was he allowed to redeem? This ruling rather supports my contention than that of the other side. The case in 27 All., 517, related to a sale held before the Transfer of Property Act and as no retrospective effect could be given to the Act it was not a case under section 99 and had no application. It is only cases of sales under section 99 that have to be considered. Further it was decided on the ground of non-joinder. I. L. R., 30 All., 146, related to a sale in favour of a third person and was clearly distinguishable. As to the third point it was submitted that a Hindu son is not bound by a sale, prohibited by law, held against the father. In such cases he is not represented by the father and cannot be deemed to be a party to the sale proceedings and the sale, as against him, was null and void.

Dr. *Satish Chandra Banerji* was not heard in reply.

RICHARDS, C. J.—The material facts connected with this appeal are as follows:—On the 11th of June, 1881, Amir Singh and Musammat Dulra Kunwar executed a usufructuary mortgage of certain zamindari property in favour of Rani Dharam Raj Kunwar. The real mortgagor was the said Amir Singh. Possession of the *sir* land was not given in accordance with the provisions of the mortgage deed and the Rani brought a suit against the mortgagors for possession and mesne profits. She obtained a decree, and in execution, for mesne profits and costs, the mortgaged property was attached, put up to sale and purchased by the Rani. The sale was subsequently confirmed and the usual certificate issued. Lal Bahadur Singh now represents the estate

of Rani Dharam Raj Kunwar. The plaintiffs are the grandsons and great grandsons of Amir Singh and they have brought the present suit for a declaration that the auction sale mentioned above is null and void and that they are still entitled to redeem the mortgage. There is a further claim for a declaration that the plaintiffs, or some of them, are in any event ex-proprietary tenants of the *sir* land.

It seems to me that the only question we have to decide is what is the effect of section 99 of the Transfer of Property Act, which was in force at the date of the purchase by Rani Dharam Raj Kunwar. It has not been contended that, if the Rani had never occupied the position of mortgagee, and if she had obtained a simple money decree and in execution of such decree purchased the property, the plaintiffs, who are the grandsons and great grandsons of Amir Singh, could now set aside the sale and get possession of the property. The contention is that the sale was in contravention of the provisions of section 99 of the Transfer of Property Act and therefore null and void. In my opinion this case must be disposed of on the assumption that the plaintiffs have exactly the same rights that Amir Singh would have had if he had brought the suit instead of them. Section 99 is as follows:—

"Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67."

It seems to me that the decision depends on whether a sale at the instance of a mortgagee in contravention of the section was wholly illegal. If it was, then the equity of redemption never vested in the Rani and the mortgage is still capable of being redeemed. Section 99 has been repealed and new provisions have been substituted in the Code of Civil Procedure. Order XXIV, rule 14, of the first schedule is as follows:—

"Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgage property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage."

Two things will here be noticed, first that the provisions of law restraining a mortgagee from bringing mortgaged property

costs and purchased it themselves. The plaintiffs brought their suit to redeem the property treating the sale to and purchase by the mortgagees as a nullity. A Bench of this Court was of opinion that the sale was not a nullity. The sale in this case was apparently before the passing of the Transfer of Property Act. But it seems a clear authority for the proposition that if the mortgagor allows the equity of redemption to be sold and the sale confirmed without objection, he cannot later on take exception to it.

In the case of *Mangli Prasad* v. *Pati Ram* (1) the question arose as to whether or not the plaintiff had a right to redeem a subsequent mortgagee. His claim was based on purchase at an auction sale of the equity of redemption in execution of a simple money decree obtained by a mortgagee. A Bench of this Court held him to be entitled. The Court was clearly of opinion that the auction sale was not a nullity.

Again in the case of *Madan Makund Lal* v. *Jamna Kaulapuri* (2) a Bench of this Court laid it down that where a sale has been had of mortgaged property in execution of a simple money decree and the sale confirmed, the title of the auction purchaser becomes complete. In a case reported in I. L. R., 30 All., 146, exactly the same view was taken.

A contrary view seems to have been taken by DILLON, J. in the case of *Jhabba Lal* v. *Chajju Mal* (3), but the case of *Tara Chand* v. *Imdad Husain* (4) and the cases reported in Volume I and Volume II of the Allahabad Law Journal do not seem to have been brought under the notice of the learned Judge. It seems to me that with the exception of this last mentioned case, and another recent decision to which I shall presently refer, all the decisions of this Court have been in favour of the view that the sale, at the instance of a mortgagee, of mortgaged property is not a nullity, and that if no objection is taken before the confirmation such objection cannot be taken later.

In the case of *Sardar Singh* v. *Ratan Lal* (5) the facts were as follows:—Nandan Singh executed a mortgage in favour of

(1) (1904) 1 A. L. J., 360.
(2) (1899) 2 A. L. J., 123.
(3) (1907) 4 A. L. J., 767.
(4) (1896) I. L. R., 18 All., 315.
(5) (1914) I. L. R., 36 All., 516.

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Ratan Lal. Ratan Lal sued in 1898, but only asked for a simple money decree, which was granted. In execution of this decree he purchased the property himself. The sons of Nandan Singh were not made parties to the suit in which the decree had been obtained and they then brought a suit to redeem the mortgage and get possession. A Bench of this Court was of opinion that the plaintiffs were entitled to redeem. With regard to this case I can only say that I consider that in cases governed by section 99 the restrictions on a mortgagee acquiring the equity of redemption ought to be confined to the provisions of the section, and that in future the substituted provisions of the Code of Civil Procedure should regulate the rights of mortgagors and mortgagees in this respect. If, however, the learned Judges who decided the case of *Sardar Singh* v. *Ratan Lal* (1) intended to decide that a sale in contravention of section 99 was, even after confirmation, a complete nullity, such a decision was contrary to the cases previously decided in this High Court with the exception of the one case I have already mentioned. While I admit that the question is not free from difficulty, I think we ought not, without grave reason, to depart from a series of rulings of this High Court, and for this reason I do not intend to refer to the rulings of the other High Courts at any great length.

The case of *Ashutosh Sikdar* v. *Behari Lal Kirtania* (2), was a reference to the Full Bench of the Calcutta High Court. The questions were (1) whether, when a sale has been held in contravention of the provisions of section 99 of the Transfer of Property Act, the sale is a nullity or an irregular and voidable sale, and (2) whether the right of redemption of the mortgagor is or is not affected by such sale. RAMPINI, A. C. J., said in answer to the first question :—

"I think we must, after the expression of opinion of their Lordships of the Privy Council in *Khairajmal* v. *Daim*, (3) reply that a sale held in contravention of the provisions of section 99 of the Transfer of Property Act is not a nullity, but an irregular and voidable sale. In my opinion such a sale can be avoided before confirmation of sale by an application under section 244 of the Code of Civil Procedure without its being necessary for the applicant to show more than that the provisions of the Transfer of Property Act have been contravened. But after confirmation the sale can only be avoided by an application under

(1) (1914) I. L. R., 36 All., 516. (2) (1903) I. L. R., 35 Calc., 61.

(3) (1904) I. L. R., 32 Calc., 296.

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section 244, provided that the applicant proves that owing to fraud or other reasons he was kept in ignorance of the sale proceedings preliminary to sale.

"The case should therefore be remanded to the Subordinate Judge to be disposed of after enquiry into these matters and after decision of any other issues that may arise in the case The costs will abide the result.

"It seems neither necessary nor advisable for us to answer the second question put by the referring Bench."

It seems to me the reason why the learned Acting Chief Justice did not answer the second question was that the answer to the first question answered the second unless the applicant should prove that he was kept in ignorance of the sale proceedings preliminary to the sale.

BRETT, MITTRA and WOODROFFE, JJ., all agreed. MOOKERJEE, J., referred, in a more elaborate judgement, at length to the various rulings on the question, but I have no reason to think that he intended to differ from the other members of the Bench.

It is true that WOODROFFE, J., was party to a subsequent decision in the case of *Pancham Lal Chowdhury* v. *Kishun Pershad Misser* (1). With great respect I must confess to be quite unable to reconcile the two decisions. It seems to me that if the equity of redemption is sold in execution of a decree and purchased either by a third party, or by a mortgagee with the leave of the court, the equity of redemption is transferred from those persons who previously held it, to the purchaser and that the result is that if that sale is neither void nor set aside, there is no longer a right to redeem left in the previous owners of the equity of redemption. On the whole, I see no sufficient reason for overruling the previous decisions of this High Court, and I would, therefore, allow the appeal, stating at the same time, though it is perhaps hardly necessary to do so, that we express no opinion on the question whether the plaintiffs have ex-proprietary rights in the *sir* lands. The claim clearly is not a matter for the Civil Court.

BANERJI, J.—I am entirely of the same opinion and have very little to add. The learned vakil for the respondents laid considerable stress on the fact that the plaintiffs were no parties to the suit in which the decree against Amir Singh was obtained, in execution whereof the equity of redemption in the property in question was put up for sale and purchased by the mortgagee.

(1) (1910) 14 C. W. N., 579.

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In the recent rulings of this Court and of their Lordships of the Privy Council, it has been held that in the case of a joint Hindu family the manager of the family represents the whole family. The present plaintiffs must, therefore, be deemed (if they existed at the time) to have been represented by Amir Singh in the suit which was brought against him, and they were thus parties to that suit. As the learned Chief Justice has observed, the plaintiffs cannot claim a higher title than that which Amir Singh could have set up in respect of the mortgage made by him. If Amir Singh could not maintain the present suit, no more can the plaintiffs.

This leads to the question whether by reason of the provisions of section 99 of the Transfer of Property Act, the auction sale at which Rani Dharam Raj Kunwar purchased the equity of redemption was a nullity. As has been pointed out by the learned Chief Justice, the course of rulings in this Court has been that such a sale is merely voidable, and not having been avoided before confirmation it binds the mortgagor and those whom he represented as the manager of the joint family. I deem it unnecessary to refer to those rulings. The only case in which a contrary view was held was that of *Jhabba Lal* v. *Chajju Mal* (1), decided by Mr. JUSTICE DILLON. With all respect I am unable to agree with him.

The next case on which the learned vakil for the respondents relies is the recent ruling in *Sardar Singh* v. *Ratan Lal* (2). In that case Mr. JUSTICE RAFIQ distinguished the cases reported in I. L. R., 18 All., 325, I. L. R., 27 All., 450 and I. L. R., 30 All., 146, on the ground that the sale in those cases was not in favour of the mortgagee but in favour of a third party. With great deference I fail to see any distinction between the case of a purchase by the mortgagee and that of a purchase by a third party. What the section declares is that a mortgagee shall not be entitled to bring to sale the equity of redemption of his mortgagor in execution of any claim which he may have whether arising under the mortgage or not. It does not prohibit the purchase of the property by the mortgagee, if the court permits him to purchase it and allows a sale to take place. If section 99 does not render a sale in violation of the section absolutely null and void, there is

(1) (1907) 4 A. L. J., 787. (2) (1914) I. L. R., 36 All., 516.

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nothing to prevent a mortgagee purchasing under such a sale with the leave of the court. It has been held by their Lordships of the Privy Council that a mortgagee who purchases with the leave of the court is exactly in the same position as any other purchaser. Therefore the fact of the purchaser being a person other than the mortgagee, in my opinion, makes no difference so far as the application of section 99 is concerned. The learned Judges in that case do not, as it seems to me, go the length of holding that a sale in contravention of section 99 is absolutely void. If that is so, and if such a sale is only voidable, it not having been avoided before confirmation, the title of the mortgagor or of those whom he represents, or of those who derive title from him passes absolutely to the purchaser and no right remains in those persons by virtue of which they can claim redemption.

TUDBALL, J.—I concur.

By THE COURT.—The order of the Court is that the appeal is allowed and the plaintiffs' suit is dismissed with costs in all courts.

Appeal decreed.

APPELLATE CIVIL

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January, 13

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

RENKA AND ANOTHER (DEFENDANTS) *v.* BHOLA NATH (PLAINTIFF) AND NANNHU MAL AND OTHERS (DEFENDANTS)*

Hindu law—Hindu widow—Rights of widow in respect of the property of her deceased husband.

A Hindu widow in possession as such of her husband's estate is not liable to account to anyone; but is at liberty to do what she pleases with the property during her life-time provided only that she does not injure the reversion.

THIS was a suit by a person claiming to be the next reversioner to the estate of one Sewa Ram, on the death of his widow Musammat Renka. The defendants were the widow herself and certain nephews of hers to whom the widow was alleged to have granted a lease of a large amount of the property at a very low rent. The plaintiff claimed to treat this lease as an act of waste committed by the widow and asked for various reliefs; principally that the lease should be cancelled and he himself appointed

* First Appeal No. 149 of 1913, from a decree of Banke Bihari Lal, Additional Subordinate Judge of Aligarh, dated the 25th of March, 1913.

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manager of the property, or, failing that, that some person should be appointed receiver; that the widow should be given a fixed sum per annum for her maintenance and that the rest of the income should be accumulated for the benefit of the reversioner. The court of first instance appointed a receiver. The widow appealed to the High Court.

The Hon'ble Dr. *Sundar Lal* and Munshi *Gulzari Lal*, for the appellant.

Mr. *B. E. O'Conor* and Pandit *Shiam Krishna Dar*, for the respondents.

RICHARDS, C. J., and BANERJI, J.—In the suit out of which this appeal arises the plaintiff is the alleged reversioner to the estate of one Sewa Ram, upon the death of his widow Musammat Renka, the defendant of the first party. The defendants of the second party are alleged to be the nephews of the Musammat on whom she has conferred certain benefits as tenants. The defendant of the third party is a lessee from the defendant of the first party. The defendants of the fourth party are other reversioners, who apparently do not join in the suit. The claim seems to us a most extraordinary one. The plaintiff alleges that a large amount of property has been given to Jwala Prasad and his brother as their agricultural holding at a very low rent. It is also alleged that the lease granted by the Musammat is at a low rent and that a premium was taken. Paragraph 9 states that Rs. 600 or Rs. 700 per annum would be quite sufficient for the expenses of the Musammat and that the rest of the income of the property should be accumulated. The plaintiff then prays that he himself should be appointed manager during the life-time of the widow, but failing this, the court should appoint some other person as receiver; that the lease in favour of the defendant No. 3 should be declared absolutely null and void; that failing this, the plaintiff may be declared entitled to the property comprised in the lease by way of pre-emption; and lastly, that an injunction should be granted against the defendants.

The court below has made a decree appointing a receiver over the property. In our opinion the plaintiff has entirely misconceived his rights and the court below has granted him relief to which he is in no way entitled. A Hindu widow is

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entitled to remain in possession of her husband's estate during her life-time and she is not liable to account to any one. Of course, she can be restrained from committing wilful waste where it is clearly and distinctly proved that she has been guilty of such action. A Hindu widow is entitled to give the property to anyone she likes to enure so long as she lives and she need ask for no rent or other compensation for what she has done. She is clearly entitled to grant a lease and to take a premium provided that that lease is not to last longer than the term of her own life. If a Hindu widow alienates or deals with the property to the prejudice of the reversioners in a way not authorized by law, the reversioners are entitled to bring a suit for a declaration that the acts of the widow shall not prejudice the reversioners. In our opinion in the present case no acts of any kind were proved which would in any way justify the court in taking away the life estate of the widow and appointing a receiver. The widow is entitled to spend as she thinks best the entire income of the estate during her life-time.

We must set aside the decree of the court below and dismiss the plaintiff's suit with costs in all courts. If the receiver has taken possession he should forthwith file and verify his final account in the court below and when the same has been accepted by the court below he will be at once discharged.

Objections have been filed by the respondent upon which there was a deficiency in court fee which has not been made good though time has been allowed. These objections are therefore rejected with costs.

Appeal allowed.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

1915
January, 14.

BHAGWAN DAYAL AND ANOTHER (PLAINTIFFS) *v.* PARAM SUKH DAS (DEFENDANT)*

Civil *Procedure Code* (1908), *order IX, rule* 13; *order XXXII, rule* 3—*Guardian* ad litem—*Illusory appointment of guardian—Competence of minors to have a decree passed without their being represented set aside.*

A suit was brought against certain minor defendants naming as guardian *ad litem* their uncle, who was also a defendant. The uncle refused to act as

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*Second Appeal No. 1612 of 1913, from a decree of Rama Das, first Subordinate Judge of Aligarh, dated the 2nd of September, 1913, confirming a decree of P. K. Roy, Munsif of Koil, dated the 18th of January, 1913.

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The whole question was whether the Amin was or was not validly appointed. If he was not validly appointed, the mother could make the application, but if he was validly appointed his failure to make the application would bar the suit. The court, according to the rulings of the Madras Court followed here, can set aside an *ex parte* decree upon grounds other than those mentioned in order IX, rule 13. The failure of the court to follow the procedure prescribed by order XXXII, rule 3, strictly was only an irregularity and was not necessarily fatal. The decree therefore was not a nullity; *Walian* v. *Banke Behari Pershad Singh* (1). The minors could have no defence to the suit on the merits as an antecedent debt was proved against their uncle, who was the *karta* of the joint family when the suit was brought, and the decree should not be set aside upon a technical ground.

Pandit *Uma Shankar Bajpai*, was not heard in reply.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit in which the plaintiffs claimed a declaration that a decree obtained against them *ex parte* on the 30th of August, 1911, was null and void as against them. The decree in question was a decree obtained on foot of a mortgage alleged to have been executed by the father of the plaintiffs and their uncle Raghubir Sahai. The facts are as follows. The plaintiffs were at the time of the institution of the mortgage suit and still are minors. The plaintiffs in the previous suit sought to implead them as defendants through the said Raghubir Sahai as their guardian *ad litem*. Raghubir Sahai refused to be the guardian *ad litem* and informed the court that the minors lived with their mother and not with him. Eventually the court appointed the Amin as the guardian *ad litem* of the minors. This order was made without any notice having been given to the minors, or to their mother in whose care they were. There was no appointed or natural guardian other than the mother. It is not pretended that the court required the plaintiff to deposit any sum of money to enable the court Amin to employ a pleader, or to make any inquiry as to the minors' defence. Nor is it pretended that the court Amin did in fact take any step to defend the case or to inquire whether there was a defence. An *ex parte* decree was granted on the 30th of August, 1911.

(1) (1903) I. L. R., 30 Calc., 1021 (1030).

An attempt was made on behalf of the minors through their mother to have the case restored, but this application was refused. The present suit was then instituted.

Both the courts below have dismissed the suit, and the plaintiffs come here in second appeal. There can be no doubt that there was great irregularity in the proceedings prior to the granting of the *ex parte* decree. The provisions of order XXXII, rule 3, were not observed. The courts below, however, were of opinion that the decree was not void and could not be set aside on account of the irregularity. They refer to the cases of *Walian* v. *Banke Behari Pershad Singh* (1) and *Munnu Lal* v. *Ghulam Abbas* (2) We think the courts below were wrong. Assuming that the decree is not a nullity, that in itself would not be a sufficient ground for dismissing the plaintiffs' suit. The court ought to have considered whether the plaintiffs were prejudiced by the irregularity. If the minors had no opportunity of putting forward a defence to the suit, or, in other words, if they were not represented in the court below, they would be prejudiced. It seems to us that the appointment of an officer of the court as guardian *ad litem* of minors without requiring the party at whose instance he is appointed to deposit the necessary funds to enable the guardian to defend the case, is generally little more than a farce. If however, in the present case the order had been made with notice to the mother she might have objected to the appointment of the Amin, or at least have given him instructions as to the defence of the minors. There is no real hardship in requiring the party to deposit money to enable the court official to inquire and get instructions on behalf of minors. If the party is successful in the litigation, the funds so deposited can be subsequently recovered. In the case of *Walian* v. *Banke Behari Pershad Singh* (1) the minors had been sued and had appeared throughout the proceedings with their mother as guardian *ad litem*. The irregularity in the case was the absence from the record of a formal order appointing the mother guardian *ad litem*. The mother was the person who would naturally have been appointed guardian had an application been made. By appearing in the proceedings she showed that she had no objection to being guardian. The decree was granted

(1) (1903) I. L. R., 30 Calc., 1021. (2) (1910) I. L. R., 32 All., 287.

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in the year 1881 and the suit challenging its validity was not instituted until January, 1895. Their Lordships held that the minors were "substantially" sued in the former suit. Their Lordships quote from the judgement of the High Court the following words:—"It is necessary that the court should see that a proper guardian be appointed to protect their interest. Section 443 of the Code is imperative on this point." Their Lordships then say:—"In this statement of the law their Lordships entirely concur and they desire to impress upon all the courts in India the importance of following strictly the rules laid down in the section referred to." After this statement it seems to us impossible to contend that minors cannot have a decree declared not binding on them under circumstances like the present where the appointment of the guardian was not only irregular but where in fact a decree was made without even notice to the minors. In *Munnu Lal* v. *Ghulam Abbas* (1) the only irregularity was the absence of the affidavit specified in section 457 of the Code of Civil Procedure, 1882. This case was even a weaker one than the case above referred to. The minors were clearly "substantially" represented and had every opportunity of putting forward their defence. It is contended by the learned advocate on behalf of the respondent that the only remedy the minors had was to apply to have the *ex parte* decree set aside under the provisions of order IX, rule 13, of the Code of Civil Procedure. This rule enables a defendant who has not been served with the summons, or was prevented by some sufficient cause from appearing when the suit was called on for hearing, to have an *ex parte* decree set aside. It is argued that the defendant against whom an *ex parte* decree has been made who neglects to avail himself of the provisions of this rule, cannot afterwards bring an independent suit. This may be so. But this is not the case here. If the minors were parties to the suit the only person who could make an application to have the *ex parte* decree set aside would be the court Amin who was their irregularly appointed guardian *ad litem*. No such application was made by him. In our opinion we have to see whether the irregularity in the present case prejudiced or may have prejudiced the minors. Holding, as we do, that the minors were never properly

(1) (1910) I. L. R., 32 All., 287.

represented and that the decree was made without notice to them or their natural guardian, we think that they are entitled to the declaration sought in the present suit.

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We accordingly allow the appeal, set aside the decrees of both the courts below and decree the plaintiffs' claim with costs in all courts.

Appeal allowed.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1915 *January, 21.*

JAGANNATH GIR (PLAINTIFF) v. TIRGUNA NAND AND OTHERS (DEFENDANTS).*

Act No. I of 1877 (Specific Relief Act), section 42—Suit for declaration of title—Property involved in possession of Court of Wards for person entitled thereto—Parties to suit.

On the death of a mahant, the right of succession to whose *math* was disputed, the Court of Wards took possession of the *math* and declined to hand it over until some one should establish his right to the mahantship. *Held*, in a suit for a declaration of his title to the mahantship brought by a claimant thereto, (1) that the Court of Wards was not a necessary party, and (2) that this did not offend against the provisions of section 42 of the Specific Relief Act. *Goswami Ranchor Lalji v. Sri Girdhariji*, (1) distinguished.

THE facts of this case were as follows:—

The plaintiff sued for a declaration that he was entitled to certain *math* property as the mahant thereof in succession to the last mahant. It appears that the last mahant, one Narain Gir, was a minor and that the property was taken over by the Court of Wards. After his death the plaintiff made claim, as did certain other persons who are the defendants to the present suit. The Court of Wards, which is in possession of the property, declined to hand over possession until some one should establish his title to the mahantship.

The lower court without going into the merits dismissed the plaintiff's suit upon two grounds, namely, that the Court of Wards was not made party to the suit, and that the plaintiff did not claim possession.

The plaintiff appealed to the High Court.

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* First Appeal No. 270 of 1913, from a decree of B. J. Dalal, District Judge of Benares, dated the 24th of April, 1913.

(1) (1897) I. L. R., 20 All., 120.

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JAGANNATH GIR v. TIRGUNA NAND.

Dr. *Satish Chandra Banerji*, Babu *Purshotam Das Tandan* and Pandit *K. N. Laghate*, for the appellant.

Munshi *Kalindi Prasad*, for the respondents.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit in which the plaintiff claimed a declaration that he was entitled to certain *math* property as the mahant thereof in succession to the last mahant. It appears that the last mahant, one Narain Gir, was a minor and that the property was taken over by the Court of Wards. After his death the plaintiff made claim, as did certain other persons who are the defendants to the present suit. The Court of Wards, which is in possession of the property, declined to hand over possession until some one should establish his title to the mahantship.

The lower court without going into the merits has dismissed the plaintiff's suit upon two grounds, namely, that the Court of Wards was not made party to the suit, and that the plaintiff did not claim possession.

It seems to us that the suit ought not to have been dismissed on either of these grounds. The Court of Wards made no claim to the property. If the Court of Wards wished to be made a party to the suit it could apply to the court to be made a party on its peril on the question of costs. If the court below thought that the suit could not be disposed of without the Court of Wards being a party, it could, and in our opinion, ought to have exercised its jurisdiction in making the Court of Wards a party to the suit. We, however, think that it is highly probable in the present case that the Court of Wards will be perfectly satisfied with the decision of the court in the present suit, and that it had no desire of any kind to be made a party to the proceedings.

On the second question we are of opinion that the possession of the Court of Wards is in trust for the person who shall establish his title to the mahantship. No one is entitled to get possession from the Court of Wards until such time as his title is established. Therefore the plaintiff was not entitled, at the time he brought his suit, to possession. We, therefore, think that section 42 of the Specific Relief Act does not apply to the circumstances of the present case. As we have already pointed out, the Court of

Wards does not deny the plaintiff's title but admits that it holds the property for the person legally entitled. The learned District Judge has referred to the case of *Goswami Ranchor Lalji* v. *Sri Girdhariji* (1). In our opinion this case has no bearing on the present case. The court in that case, we think, rightly held that the plaintiff's proper remedy was by way of a suit for possession against the parties who dispossessed him. The suit being a suit for possession, the period within which it could be brought was twelve years. This was the only matter which was discussed in the case.

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JAGANNATH GIR v. TIRGUNA NAND.

We accordingly allow the appeal, set aside the decree of the court below, and remand the case to that court with directions to readmit the suit under its original number in the file and to proceed to hear and determine the same on its merits. Costs heretofore will be costs in the cause.

Appeal allowed and cause remanded.

REVISIONAL CRIMINAL.

1915 January, 29.

Before Mr. Justice Piggott.

EMPEROR v. PARAS RAM DUBE.*

Act No. XLV of 1860 (Indian Penal Code), sections 82, 83—Offence of rape committed by a boy under fourteen—Presumption.

Held that the presumption of English law against the possibility of the commission of the offence of rape by a boy under the age of years 14 has no application to India.

THIS was a case called for by the High Court on perusal of the Sessions statement for November, 1914, from the district of Basti. The material facts were that a boy named Paras Ram of 12 to 14 years of age was charged with the commission of rape on a little girl of about 7 years of age. The Additional Sessions Judge convicted him in the alternative under section 376 or section 354 of the Indian Penal Code not because he had any doubt as to the facts, but because he considered that there was a difficulty as to whether a boy of the age of the accused could be legally convicted of the major offence charged.

The parties were not represented.

* Criminal Revision No. 33 of 1915.

(1) (1897) I. L. R., 20 All., 120.

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PIGGOTT, J.—I called for the record of this case on examination of the Sessions statement from the District of Basti for the month of November, 1914. One Paras Ram, a boy described as being between 12 and 14 years of age, was charged with having committed the offence of rape on the person of a little girl about 7 years of age. The learned Sessions Judge has convicted in the alternative under section 376 or section 354 of the Indian Penal Code, not because he was in any doubt as to the facts, but because he considered that there was a difficulty as to whether a boy of the age of the accused could legally be convicted of the major offence charged. The presumption of English Law against the possibility of the commission of the offence of rape by a boy under the age of 14 years has no application in this country. The law on the subject of infancy in connection with criminal liability is laid down in sections 82 and 83 of the Indian Penal Code and nowhere else. It was a simple question of fact which the learned Sessions Judge had to try, as to whether, in the course of the assault perpetrated by the accused on the person of this little girl, such penetration had been effected as is required by law to constitute the offence of rape. If the statement of the girl Kolbaria is read in connection with the medical evidence, there can be no doubt that the offence of rape was committed. I thought it advisable to place these remarks on record in view of the difficulty felt by the Sessions Judge. I do not propose to interfere with the sentence passed by him. The question of the proper punishment for an offence of this sort by boys of tender age is not an easy one, and many Sessions Judges of experience are of opinion that a sentence of whipping only is the most appropriate one that can be inflicted in such cases. I think the accused Paras Ram has been somewhat leniently dealt with, but that interference on the part of this Court is not now called for. Let the record be returned.

APPELLATE CIVIL.

1914
December, 14.

Before Mr. Justice Chamier and Mr. Justice Piggott.

JAWAHIR (PLAINTIFF) v. NEKI RAM (DEFENDANT).*

Civil Procedure Code (1908), section 20 (c)—Cause of action—Jurisdiction—Suit to set aside a decree on the ground of fraud—Decree obtained in Bengal—Suit filed in Agra.

The plaintiff sued in the court of a Munsif in the district of Agra, to set aside on the ground of fraud a decree obtained from a Court at Siliguri in Bengal. It was part of the plaintiff's case that the defendant fraudulently prevented the institution of the suit from becoming known to him, by causing the notice of suit to be served on some other person and an incorrect return to be made to the Court. The plaintiff further alleged that the defendant had in execution of his decree caused certain property belonging to the plaintiff in the district of Agra to be attached.

Held that a material portion of the plaintiff's cause of action arose in the district of Agra and the Munsif had jurisdiction to try the case.

Banke Behari Lal v *Pokhe Ram* (1), *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (2), *Radha Raman Shaha* v *Pran Nath Roy* (3), *Khagendra Nath Mahata* v. *Pran Nath Roy* (4), *Thakur Prosad* v. *Punkal Singh* (5), *Abdul Huq Chowdhry* v. *Abdul Hafiz* (6) referred to. *Dan Dayal* v. *Munna Lal* (7) and *Kalian Das* v. *Bakhshi Ram* (8) not followed.

THE facts of this case were as follows:—

The respondent obtained a decree against the appellant in a court at Siliguri in Bengal. The decree was transferred for execution to the court of the Munsif of Fatehabad, in the Agra district; and in execution thereof appellant's property within the jurisdiction of that court was attached. The appellant then brought a suit against the respondent in the court of the said Munsif praying to have the decree set aside on the ground that it had been obtained by fraud and also praying for a permanent injunction restraining the respondent from executing the same. It was alleged by the plaintiff appellant, and found by the Munsif, that the claim upon which the respondent had obtained the decree was entirely baseless and false and that the summons in that

*Second Appeal No. 179 of 1914, from a decree of H. W. Lyle, District Judge of Agra, dated the 24th of November, 1913, reversing a decree of Shams-uddin Khan, Munsif of Fatehabad, dated the 11th of August, 1913.

(1) (1903) I. L. R., 25 All., 48.
(2) (1914) I. L. R., 41 Calc., 990.
(3) (1901) I. L. R., 28 Calc., 475.
(4) (1902) I. L. R., 29 Calc., 395.
(5) (1907) 8 C. L. J., 485.
(6) (1905) 14 C. W. N., 695.
(7) (1914) I. L. R., 36 All., 264.
(8) (1910) P. A. L. O., No. 14 of 1910.

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suit had not been served upon the appellant at all, but that the respondent had fraudulently caused it to be served upon some other person and made it appear that it had been served upon the appellant. The Munsif decreed the suit. On appeal, the District Judge held that the suit was not maintainable and declined to enter into the merits of the claim upon which the respondent had obtained his decree. The suit was accordingly dismissed by the District Judge. The plaintiff appealed to the High Court.

Munshi *Narmadeshwar Prasad* (for Dr. *Surendra Nath Sen*), for the appellant:—

A suit to set aside a decree obtained by fraud and for other consequential reliefs is maintainable; and such a suit can be entertained by a court other than the court which passed the decree which is called in question; *Banke Behari Lal* v. *Pokhe Ram* (1), *Thakur Prosad* v. *Punkal Singh* (2), *Radha Raman Shaha* v. *Pran Nath Roy* (3). The Munsif of Fatehabad had jurisdiction under clause (c) of section 20 of the Code of Civil Procedure to entertain the suit. The attachment of the plaintiff's property in execution of the respondent's decree is certainly a part, and a material part, of the plaintiff's cause of action. That attachment having taken place within the jurisdiction of the said Munsif's court, the cause of action arose there in part at any rate. The execution of the decree and the attachment of the plaintiff's property are acts which infringe his rights and afford him his principal cause of action; *Banke Behari Lal* v. *Pokhe Ram* (1). The plaintiff's cause of action includes the effect of the decree upon his property. Injury thereto has resulted from the operation of the decree, and the decree has become operative within the jurisdiction of the Fatehabad court. That court, therefore, can entertain the suit; *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub* (4). The ruling in *Umrao Singh* v. *Hardeo* (5) is distinguishable. In that case the sole relief claimed was to have the decree set aside; no consequential relief whatsoever was asked for. The case of *Dan Dayal* v. *Munna Lal* (6) is also distinguishable.

(1) (1902) I. L. R., 25 All., 48.
(2) (1907) 8 C. L. J., 485.
(3) (1901) I. L. R., 28 Calc., 475.
(4) (1874) 13 B. L. R., 91 (98).
(5) (1907) I. L. R., 29 All., 418.
(6) (1914) I. L. R., 36 All., 564.

Munshi *Gulzari Lal*, for the respondent:—

The ruling in *Dan Dayal* v. *Munna Lal* (1) is in my favour and exactly applies to the present case. There too, the plaintiff's property was, in execution of the impugned decree, attached within the jurisdiction of the court in which the suit to have the decree set aside on the ground of fraud was brought; and it was held that that court had no jurisdiction to entertain the suit. Another decision in my favour is that in *Kalian Das* v. *Bakhshi Ram* (2), decided on the 29th of July, 1910, (unreported). It was there held that a court within whose jurisdiction the plaintiff had been arrested in execution of the impugned decree would not by reason of that fact have jurisdiction to try a suit of this kind. I am further supported by the case of *Umrao Singh* v. *Hardeo* (3). The ground upon which the decree is sought to be set aside is fraud. That fraud (if there was any fraud) was perpetrated at Siliguri in Bengal. The cause of action for that relief arose there and not within the jurisdiction of the Fatehabad court. The addition of a prayer for an injunction to restrain the decree-holder from executing the decree is merely superfluous and does not alter the case. This was pointed out in the case of *Dan Dayal* v. *Munna Lal* (1) cited above. The ruling in *Banke Behari Lal* v. *Pokhe Ram* (4), relied upon by the appellant, was distinguished in I. L. R., 36 All., at p. 566.

CHAMIER and PIGGOTT JJ.—This was a suit by the appellant praying that a decree for money obtained against him by the respondent in Siliguri might be set aside on the ground that it had been obtained by fraud, and that an injunction might be issued restraining the respondent from executing the same. The appellant alleged that the claim on which the decree rested was totally without foundation, that the respondent had taken steps to prevent the institution of the suit from becoming known to him, and that he knew nothing of it till the 8th of October, 1911, when the respondent caused some of his property to be attached within the jurisdiction of the Munsif of Fatehabad in the Agra district. The appellant alleged that a cause of action accrued to him on the 11th of October, at the place where the attachment was effected.

(1) (1914) I. L. R., 36 All., 564.

(2) (1910) F. A. f. O., No. 14 of 1910.

(3) (1907) I. L. R., 29 All., 418.

(4) (1903) I. L. R., 25 All., 48.

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suit had not been served upon the appellant at all, but that the respondent had fraudulently caused it to be served upon some other person and made it appear that it had been served upon the appellant. The Munsif decreed the suit. On appeal, the District Judge held that the suit was not maintainable and declined to enter into the merits of the claim upon which the respondent had obtained his decree. The suit was accordingly dismissed by the District Judge. The plaintiff appealed to the High Court.

Munshi *Narmadeshwar Prasad* (for Dr. *Surendra Nath Sen*), for the appellant:—

A suit to set aside a decree obtained by fraud and for other consequential reliefs is maintainable; and such a suit can be entertained by a court other than the court which passed the decree which is called in question; *Banke Behari Lal* v. *Pokhe Ram* (1), *Thakur Prosad* v. *Punkal Singh* (2), *Radha Raman Shaha* v. *Pran Nath Roy* (3). The Munsif of Fatehabad had jurisdiction under clause (*c*) of section 20 of the Code of Civil Procedure to entertain the suit. The attachment of the plaintiff's property in execution of the respondent's decree is certainly a part, and a material part, of the plaintiff's cause of action. That attachment having taken place within the jurisdiction of the said Munsif's court, the cause of action arose there in part at any rate. The execution of the decree and the attachment of the plaintiff's property are acts which infringe his rights and afford him his principal cause of action; *Banke Behari Lal* v. *Pokhe Ram* (1). The plaintiff's cause of action includes the effect of the decree upon his property. Injury thereto has resulted from the operation of the decree, and the decree has become operative within the jurisdiction of the Fatehabad court. That court, therefore, can entertain the suit; *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub* (4). The ruling in *Umrao Singh* v. *Hardeo* (5) is distinguishable. In that case the sole relief claimed was to have the decree set aside; no consequential relief whatsoever was asked for. The case of *Dan Dayal* v. *Munna Lal* (6) is also distinguishable.

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(2) (1907) 8 C. L. J., 485.
(3) (1901) I. L. R., 28 Calc., 475.
(4) (1874) 13 B. L. R., 91 (98).
(5) (1907) I. L. R., 29 All., 418.
(6) (1914) I. L. R., 36 All., 564.

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Munshi *Gulzari Lal*, for the respondent:—

The ruling in *Dan Dayal* v. *Munna Lal* (1) is in my favour and exactly applies to the present case. There too, the plaintiff's property was, in execution of the impugned decree, attached *within the jurisdiction of the court in which the suit to have the* decree set aside on the ground of fraud was brought; and it was held that that court had no jurisdiction to entertain the suit. Another decision in my favour is that in *Kalian Das* v. *Bakhshi Ram* (2), decided on the 29th of July, 1910, (unreported). It was there held that a court within whose jurisdiction the plaintiff had been arrested in execution of the impugned decree would not by reason of that fact have jurisdiction to try a suit of this kind. I am further supported by the case of *Umrao Singh* v. *Hardeo* (3). The ground upon which the decree is sought to be set aside is fraud. That fraud (if there was any fraud) was perpetrated at Siliguri in Bengal. The cause of action for that relief arose there and not within the jurisdiction of the Fatehabad court. The addition of a prayer for an injunction to restrain the decree-holder from executing the decree is merely superfluous and does not alter the case. This was pointed out in the case of *Dan Dayal* v. *Munna Lal* (1) cited above. The ruling in *Banke Behari Lal* v. *Pokhe Ram* (4), relied upon by the appellant, was distinguished in I. L. R., 36 All., at p. 566.

CHAMIER and PIGGOTT JJ.—This was a suit by the appellant praying that a decree for money obtained against him by the respondent in Siliguri might be set aside on the ground that it had been obtained by fraud, and that an injunction might be issued restraining the respondent from executing the same. The appellant alleged that the claim on which the decree rested was totally without foundation, that the respondent had taken steps to prevent the institution of the suit from becoming known to him, and that he knew nothing of it till the 8th of October, 1911, when the respondent caused some of his property to be attached within the jurisdiction of the Munsif of Fatehabad in the Agra district. The appellant alleged that a cause of action accrued to him on the 11th of October, at the place where the attachment was effected.

(1) (1914) I. L. R., 36 All., 564.
(2) (1910) F. A. f. O., No. 14 of 1910.
(3) (1907) I. L. R., 29 All., 418.
(4) (1902) I. L. R., 25 All., 48.

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The Munsif decreed the claim; but on appeal the District Judge held that the suit was not maintainable at all. He seems to have thought that the whole of the appellant's case was, that the summons in the suit had not been served on him, and he declined to consider whether there was any foundation for the respondent's suit. The learned Judge has, we think, misunderstood the case. A plaintiff in a case of this kind cannot succeed merely on proving that the summons was not served on him; but if he proves that the former suit had no foundation in fact, but was the outcome of previous enmity, that the summons was not served on him, and that the person who is said to have been present at the service was not there at all, and if he proves other facts also which tend to show that the defendant was anxious to avoid a fair trial of the issue between the parties, it is certainly open to the court to find that the decree was obtained by fraud. The Munsif found that the appellant had proved all this, and he held that the decree had been obtained by fraud. It seems to us that in a case of this kind the court can and must go into the whole matter before it can decide the case with any satisfaction to itself or anyone else. That was the view taken in *Lakshmi Charan Saha* v. *Nur Ali* (1) and it is supported by ample authority. As was said by LORD ROBERTSON in *Khagendra Nath Mahata* v. *Pran Nath Roy* (2), which was a suit of this kind, "the appellant's allegation is an attack, not on the sufficiency of the service of notice but on the whole suit as a fraud from beginning to end." So far as the merits of the case are concerned, we have no hesitation in saying that the proceedings in the lower appellate court were not satisfactory.

It is, however, contended, on the authority of the decision in *Dan Dayal* v. *Munna Lal* (3) that such a suit as this does not lie at all, except possibly in the court or district in which the decree impugned was passed.

That such a suit will lie is beyond doubt, see the remarks of JENKINS, C. J., in *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (4) and the decisions of the Privy Council in *Radha Raman Shaha* v. *Pran Nath Roy* (5) (affirming the decision of

(1) (1911) I. L. R., 38 Calc., 936.
(2) (1902) I. L. R., 29 Calc., 395.
(3) (1914) I. L. R., 36 All., 564.
(4) (1914) I. L. R., 41 Calc., 990.
(5) (1901) I. L. R., 28 Calc., 475.

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the High Court reported in I. L. R., 24 Calc., 546) and *Khagendra Nath Mahata* v. *Pran Nath Roy* (1). Other recent instances of such suits are *Thakur Prosad* v. *Punkal Singh* (2) and *Abdul Huq Chowdhry* v. *Abdul Hafiz* (3). Incidentally these cases show also that a suit to set aside a decree on the ground of fraud may be brought in a court other than that by which the impugned decree was passed, and we may observe that if it were otherwise no suit could be brought to set aside a decree obtained by fraud in a Court of Small Causes, however gross the fraud might be.

But in this Court there seems to be a conflict of opinion on the question whether a suit will lie in these provinces against a resident of another province to have a decree obtained by him in that province set aside on the ground of fraud, even when property of the plaintiff in these provinces has been attached in execution of the decree impugned. In *Banke Behari Lal* v. *Pokhe Ram* (4) it was held that a suit would lie in Cawnpore against a resident of Calcutta to have a decree obtained by him in the Calcutta High Court set aside on the ground of fraud, when property of the plaintiff in Cawnpore had been attached in execution of the decree impugned. But in *Kalian Das* v. *Bakhshi Ram* (5) KNOX and GRIFFIN, JJ., held that a suit to set aside, on the ground of fraud, a decree obtained in Kachar by a resident of that place would not lie in Agra, even though the plaintiff had been arrested in Agra in execution of that decree, and in *Dan Dayal* v. *Munna Lal* (6) RICHARDS, C. J., and TUDBALL, J., held that a suit did not lie in Mainpuri against a resident of Calcutta to set aside, on the ground of fraud, a decree obtained by him in Calcutta in execution of which the plaintiff's property in Mainpuri had been attached. In the course of the principal judgement it is said that "all that the plaintiff complains of happened in Calcutta and therefore the cause of action arose in Calcutta and no where else." As at present advised we are not prepared to take this view. In the plaint in that case the plaintiff complained specifically of the attachment of his property in the

(1) (1902) I. L. R., 29 Calc., 395.
(2) (1907) 8 C. L. J., 435.
(3) (1903) 14 C. W. N., 695.
(4) (1903) I. L. R., 25 All., 48.
(5) (1910) P. A. I. C. No. 11 of 1910.
(6) (1914) I. L. R., 36 All., 564.

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Mainpuri district, and he prayed for an injunction directing the defendant to release the property from attachment. It seems to us that the attachment of the property was an important part of his cause of action and that it gave the plaintiff the right to sue in Mainpuri. We agree with the observation made in the case of *Banke Behari Lal* v. *Pokhe Ram* (1) by BANERJI, J., that "the execution of the decree and the application for the realization of the amount of it are acts of the defendant which infringe the rights of the plaintiff and afford him his principal cause of action."

In view of the conflict between the decisions in I. L. R., 36 All., 564 and F. A. f. O. No. 14 of 1910 on the one hand and in I. L. R., 25 All., 48, on the other, we have considered the propriety of referring this case to a larger bench; but we have come to the conclusion that such a course is unnecessary. It is part of the plaintiff's case that the defendant fraudulently prevented the institution of the suit from becoming known to him by causing the notice of suit to be served on some other person and an incorrect return to be made to the court. This is part and parcel of the fraud alleged, and if the allegation is found to be true, part of the fraud was committed in the Agra district and there can be no doubt that the cause of action arose in part at least in the Agra district, even if the attachment of the plaintiff's property is not part of the cause of action.

We therefore direct that the record be returned to the lower appellate court in order that a finding may be recorded upon the second issue. Further evidence will not be admitted except for good cause shown. On return of the finding ten days will be allowed for objections.

Issue remitted.

(1) (1902) I. L. R., 25 All., 48.

Before Mr. Justice Chamier and Mr. Justice Piggott.

1914
December, 14.

KUNWAR BAHADUR (PLAINTIFF) *v.* BINDRABAN AND OTHERS (DEFENDANTS.) *.

Act No IX of 1908 (Indian Limitation Act), schedule I, articles 125 and 120—Hindu law—Hindu widow—Suit for declaration that alienation by widow enures only for her life—Reversioners—Right of suit by.

Held that, although the existence of nearer reversioners may be a bar to a more remote reversioner suing for a declaration that an alienation made by a Hindu widow does not enure for a longer period than the life-time of the widow, yet he is not entitled to wait until limitation has expired in respect of all the nearer reversioners before bringing his suit. The period of limitation for such a suit is, under article 125 of the first schedule to the Indian Limitation Act, 1908, twelve years from the date of the alienation for nearer and more remote reversioners alike.

THE facts of this case were as follows:—

Debi Das, Prag Das and Jwala Prasad were three brothers separate in estate from one another. On the death of Jwala Prasad his widow Musammat Rukmani succeeded to his property. A house which formed part of that property was sold by Musammat Rukmani on the 12th of February, 1898. On the 11th of April, 1913, the plaintiff, a son of Debi Das, brought this suit for a declaration that the sale-deed was invalid and inoperative beyond the life-time of the widow The plaintiff impleaded both Debi Das and Prag Das as defendants. In paragraph 5 of the plaint the plaintiff stated that his father Debi Das had long since severed connection with wordly affairs and adopted the life of a recluse in a certain garden (*muddat daraz se karobar dunyavi se talluq nahin rakhta hai aur ek bagh men gosha nashini ikhtiar kar lia hai*) and had not cared to sue to have the sale-deed declared inoperative. In respect of his uncle Prag Das the plaintiff stated in the plaint that he had colluded with Musammat Rukmani and the vendees and had been instrumental in causing the sale-deed to be executed. The plaintiff stated that his right to sue arose on the 13th of February, 1910, the date on which the 12 years' period of limitation for a suit by his father or his uncle had expired. The court of first instance granted the declaratory decree prayed for. The lower appellate court

* Second Appeal No. 192 of 1914 from a decree of Gauri Shankar, Subordinate Judge of Fatehgarh, dated the 3rd of November, 1913, reversing a decree of Lala Ram, Munsif of Kaimganj, dated the 8th of September, 1913.

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dismissed the suit as being barred by limitation. The plaintiff appealed to the High Court.

Dr. *Surendra Nath Sen*, (with him The Hon'ble Dr. *Tej Bahadur Sapru*) for the appellant:—

Article 120 of the Limitation Act applies to the suit. Under that article time begins to run from the date on which the right to sue accrues. The question is, when did the plaintiff's right to sue accrue? He is a remote reversioner, his father and uncle being the nearest reversioners. A remote reversioner can bring a suit of this nature only when the nearest reversioner has refused without sufficient cause to sue, or precluded himself by his own act or conduct from suing, or colluded with the widow, or concurred in the act alleged to be wrongful; *Rani Anand Kunwar* v. *The Court of Wards* (1). That was a case of adoption, but the same principle has been applied to cases of alienation; *Jhula* v. *Kanta Prasad* (2). In the present case there was no refusal by the nearest reversioner to sue, and as regards one of them there was no collusion or concurrence. So, the remote reversioner could come in only in the event of the remaining contingency happening, namely, if the nearest reversioners precluded themselves from suing. That happened when they allowed their right of suit to become time-barred by the lapse of 12 years' limitation provided by Art. 125. On the expiry of that period the remote reversioner became entitled to maintain a declaratory suit; *Abinash Chandra Mazumdar* v. *Harinath Shaha* (3), *Govinda Pillai* v. *Thayammal* (4). The nearest reversioner's right of suit has became barred by limitation. But that does not mean that the present plaintiff's suit is also barred; for, one reversioner does not claim or derive title through another. The words "right to sue" in Art. 120 mean the right to sue of the plaintiff or of some one through whom he claims. *Bhagwanta* v. *Sukhi* (5), *Abinash Chandra Mazumdar* v. *Harinath Shaha* (3). The plaintiff's right to come forward to sue accrued on and by reason of the expiry of the 12 years within which the nearest reversioners could have sued but did not sue.

(1) (1880) I.L.R., 6 Calc., 764.
(2) (1887) I.L.R., 9 All., 441.
(3) (1904) I.L.R., 32 Calc., (70).
(4) (1904) I.L.R., 28 Mad., 57.
(5) (1899) I.L.R., 22 All., 33.

On the facts as they stand the plaintiff could not have brought the suit before those 12 years had elapsed. An article of the Limitation Act which applies to a particular case should not be thrown aside because it might create hardship in other cases; *Lala Gobind Prasad* v. *Chairman of Patna Municipality* (1). If the date of the alienation be held to be the date when the "right to sue" mentioned in Art. 120 accrues in the case of a declaratory suit like the present by a remote reversioner, then the result will be that nearest reversioners will have 12 years from the date of the alienation within which to sue and the remote reversioners whose rights come into play only in case the rights of the nearest reversioners are not exercised, will have only six years from the same starting point for their suit.

Babu *Sarat Chandra Chaudhri* (for Dr. *Satish Chandra Banerji*) for the respondents :—

The plaintiff himself alleges that his uncle Prag Das was colluding with the widow and the vendee. So, under the rulings cited by him, he was at once entitled to bring his suit, so far as his uncle was concerned. As for his father, Debi Das, the plaintiff alleges in paragraph 5 of the plaint that Debi Das had long ago completely retired from the world and its affairs and would not care to institute proceedings himself. Presumably he had so retired at the time of the alienation. This was sufficient to let in the plaintiff at once; the father's conduct amounted to refusal to sue. Neither the Privy Council case in I. L. R., 6 Calc., 764, nor any other case lays down that the six years' period of limitation for a suit by a remote reversioner is to commence after the 12 years prescribed by Art. 125 have expired. I rely on the following cases:—*Kalavathal* v. *Thirupatti Pallavarayan* (2), *Guntupalli Ramanna* v. *Guntupalli Annamma* (3). These cases lay down that in a suit like the present which is governed by Art. 120 the "right to sue" accrues on the date of the alienation and not on the date of collusion of the nearest reversioner nor on the expiry of the 12 years' period prescribed for him. The observations at p. 478 in *Chooramani Dasi* v. *Baidya Nath Naik* (4) may

(1) (1907) 6 C. L. J., 535.
(2) (1900) 10 M. L. J., 219.
(3) (1912) 24 M. L. J., 183.
(4) (1904) I. L. R., 32 Calc., 473.

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be taken to support me. The cause of action arises when the alienation is known; although there may be a present bar to a remote reversioner's instituting the suit at once it is his duty to try and remove the bar by means of notice served on the near reversioner and thereafter bring the suit. There is only one cause of action for all reversioners during the life of the widow, namely, the alienation ; the nearest reversioner is given the right to sue before the remote reversioner, because he is the person best entitled to protect the interests of all by getting the alienation set aside. It is only when by his act or omission such a suit is not possible that a remote reversioner takes his place and becomes entitled to do what he could have done; that is, he becomes entitled to bring a suit to set aside the alienation. That is the principle which is deducible from *Rani Anand Kunwar's* case. The cause of action being one and the same for both, the date of alienation furnishes the starting point for limitation in both cases. The observations in I. L. R., 32, Calc., 62 are *obiter* and the case could have been and was in fact disposed of on the ground of the plaintiff's minority.

Dr. *Surendra Nath Sen*, in reply :—

The statement in the plaint does not warrant the conclusion that the plaintiff's father was civilly dead. This contention was never put forward in either of the courts below. There is no issue and no finding on this point. Mere non-suing does not amount to a refusal to sue. The law does not require a remote reversioner to make a demand of the nearest reversioner to sue in order to bring his own right of suit into existence. The alienation, no doubt furnishes the cause of action; but the right of suit is a different thing.

CHAMIER and PIGGOTT, JJ.—This is a second appeal by a plaintiff whose suit for a declaration has been dismissed by the lower appellate Court as barred by limitation. Debi Das, father of the plaintiff, had two brothers, Jwala Prasad and Prag Das ; they lived separately. Jwala Prasad died childless, leaving a widow, Musammat Rukmani. This lady, while in possession of the property of her late husband with a Hindu widow's estate, executed a deed of sale on the 12th of February, 1898, transferring to certain persons, who appear as defendants nos. 1 and 2 in the

case, a house which had belonged to her late husband. By the present suit, instituted on the 11th of April, 1913, the plaintiff sought a declaration that this sale deed was ineffectual as against him and enforceable only during the life-time of Musammat Rukmani. He impleaded this lady as a defendant, and also his own father Debi Das, and his uncle Prag Das. Only the defendants vendees contested the suit, no appearance being entered by any of the others. Ordinarily the plaintiff would not be permitted to maintain such a suit, he not being the nearest reversioner to the estate of Jwala Prasad in the presence of his own father and uncle. The plaintiff accordingly pleaded that Prag Das had colluded with Musammat Rukmani and with the vendees at the time of the sale. With reference to Debi Das he pleaded that the latter had "long since severed himself from all connection with mundane affairs and elected to reside in solitude in a certain garden." He claimed that a cause of action accrued to him on the 13th of February, 1910, the date on which a suit by his father or his uncle became barred by limitation under the provisions of Article 125 of the first schedule to the Indian Limitation Act (No. IX of 1908), and that his suit was within time under Article 120 of the same schedule. It may be noted that the plaintiff gave his own age as thirty years in June or July, 1913, so that he attained majority within three years of the execution of the sale-deed in question. There is therefore no question of any extension of the period of limitation on the ground of the plaintiff's minority.

The learned Subordinate Judge has found clear authority in certain decisions of the Madras High Court, referred to in his judgement, for the proposition that the plaintiff's cause of action accrued to him on the date of the execution of the sale-deed of the 12th of February, 1898, and that the period of limitation for the same is that provided by Article 120 of the Schedule to the Limitation Act. He has not therefore thought it necessary to examine in any detail the precise pleadings in this particular case. Yet these are sufficient in themselves to make the plaintiff's position a very difficult one, even if the propositions of law contended for on his behalf are correct. So far as his uncle Prag Das is concerned, the plaintiff's allegation that a cause of action accrued to him on the 13th of February, 1910, will not

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28 Madras turned on the minority of the plaintiff in each of those cases. The truth appears to be that the various articles in the schedule to the Limitation Act dealing with such suits as the present, and cognate suits to contest an adoption by a widow, were framed with special reference to the provisions of section 42 of the Specific Relief Act (No. I of 1877). The schedule therefore made no express provision for the rare cases in which a suit like the present is permitted to be brought by a more remote reversioner by reason of collusion or wilful default on the part of the nearest reversioner or reversioners. The result no doubt is that such suits must necessarily be referred to Article 120 of the schedule. It does not follow, however, that a remoter reversioner is thereby entitled to sit still and wait for limitation to run out against every reversioner nearer in degree than himself. An improper alienation by a Hindu widow is a wrong to the entire body of reversioners, and in a sense it affords an immediate cause of action to all of them. The reasons why such action is ordinarily required to be brought by the nearest reversioner in degree, and the special cases in which this rule may be relaxed have been pretty well settled since the decision of the Privy Council in *Rani Anand Kunwar's* case. But it is for more remote reversioners to be on the watch to safeguard their own interests, and, when they find that no action is being taken by the nearest reversioner or reversioners, to inquire into the reasons for such inaction and call upon the person or persons entitled to do so to protect the interests of the whole body of reversioners. For the purposes of the present case it is quite sufficient to say that it must lie heavily on the plaintiff in a suit like the present to explain why he took no action before the period of limitation prescribed for a suit by the nearest reversioner had expired. It is not necessary for us to go the full length of the Madras ruling relied on by the learned Subordinate Judge in order to arrive at the conclusion that he has rightly dismissed the present suit as time-barred. So holding we dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Chamier and Mr. Justice Piggott.

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December, 16.

AHMAD RAZA KHAN (PLAINTIFF) *v.* RAM LAL AND ANOTHER (DEFENDANTS) *

Possession—Tenants in common—Presumption—Possession of one co-owner the possession of all.

Possession of one co-owner is in law the possession of all the co-owners and nothing short of ouster or something equivalent to ouster will put an end to that possession. Where a co-owner in possession did not deny the title of the other co-owners till shortly before the institution of the suit and never laid claim to more than his share, it was presumed that the co-owner in possession was in possession on his own behalf and as well as on behalf of his co-owner. *Corea* v. *Appuhamy* (1) followed. *Jafar Husain* v. *Mashuq Ali* (2) and *Jogendra Nath Rai* v. *Baladeo Das* (3) referred to.

THE facts of this case were as follows :—

Two brothers, Nihal Singh and Bhawani Singh, were co-owners of a certain enclosure of land in the town of Aligarh. The half share of Nihal Singh was inherited by his grandsons, and in May, 1909, was sold by them to the plaintiff. Although they professed to be the owners of the whole and purported to sell the whole, admittedly only a half share passed to the plaintiff. The half share of Bhawani Singh passed to his son. In execution of a decree against the son his share was sold by auction. The auction purchasers, in August, 1909, sold this half share to the defendants. The plaintiff brought the present suit for possession by partition of his half share, and the defendants pleaded that they and their predecessors in title had been in exclusive and adverse possession of the whole property for more than 12 years. The plaintiff alleged that he had been in possession of his share till March, 1911, when the defendants denied his title. The court of first instance found that the plaintiff or his vendors had not been in possession at any time within 12 years of the suit and dismissed it. The court also found that the defendants had failed to prove adverse possession for 12 years. The lower appellate court maintained the finding that the plaintiff had not been in possession

* Second Appeal No. 1514 of 1913 from a decree of Banke Behari Lal, Second Additional Judge of Aligarh, dated the 11th of June, 1913, confirming a decree of Farid-ud-din Ahmad Khan Additional Munsif of Hawali, dated the 14th of May, 1912.

(1) L. R., (1912) A. C., 230 (2) (1892) I. L. R., 14 All., 193.

(3) (1907) I. L. R., 35 Calc., 961.

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within 12 years prior to the suit and further held that as the possession of one of two co-owners could not be regarded as the possession of the other the defendants must be deemed to have been in adverse possession.

The plaintiff appealed to the High Court.

Pandit *Shiam Krishna Dar*, for the appellant :—

The question is whether in the case of co-owners it is for the plaintiff to prove that he has been in possession within 12 years, or for the defendant to establish that he has been in adverse possession for over 12 years. The fundamental rule is that the possession of one co-owner will not be presumed to be adverse to the others but will ordinarily be held to be on behalf of all. The law will not construe a possession to be tortious unless from necessity. Possession will not be deemed adverse unless the commencement and continuance thereof are proved to have been wrongful. The possession of one co-tenant will not be held to have been adverse unless it is clearly proved that he ousted the others or repudiated their title and that they had notice or information of his assertion of exclusive ownership. Mere possession, however exclusive or long-continued, if silent, cannot give one co-tenant in possession title as against the others; *Jogendra Nath Rai* v. *Baladeo Das*, (1). Much stronger evidence is required to prove adverse possession held by a tenant in common than by a stranger; and in the present case there is no satisfactory evidence that the defendants or their predecessors in title ever ousted the plaintiff or his vendor or ever repudiated their title to a half-share of the property. In fact the vendors of the defendants admitted at the time of the sale in August, 1909, that they were owners of only a half-share of the property although, according to the findings, they were in possession of the whole. They did not repudiate the title of the owners of the other half. In a similar case of possession by partition brought by the purchaser of the share of one Hindu co-parcener against the other co-parceners it was held that it was incumbent on the party raising the plea of adverse possession to prove that the plaintiff's vendor was, in denial of his title, ever excluded from the enjoyment of his share of the property; and the article of the Limitation Act held applicable to the suit was article 144;

(1) (1907) I. L. R., 35 Calc., 961 (969).

Davvadu Hari Kistna Chowdury v. *Venkata Lakshmi Narayana Pantulu* (1). *Ittáppan* v. *Manavikrama* (2), *Harcharan* v. *Bindu* (3). The plaintiff must be deemed to have had constructive possession through the possession of his co-owners.

Babu *Durga Charan Banerji* (with him Munshi *Lakshmi Narain*), for the respondents :—

The present suit, although brought in the guise of a suit for partition, is really nothing more than a suit for recovery of possession, for, it has been found by the court below that the plaintiff and his predecessors in title have been out of possession for over 12 years. It has been laid down as a general rule that where in a suit for recovery of possession the defendant sets up a plea of adverse possession for more than 12 years it is for the plaintiff to prove a subsisting title by proving possession within 12 years of the suit; *Jafar Husain* v. *Mashuq Ali* (4). There can be no presumption of continuance of co-ownership in the sense that the possession of one is to be deemed the possession of the other in a case like this where the shares of the original co-parceners have passed into the hands of strangers by a succession of devolutions and transfers. *Deba* v. *Rohtagi Mal* (5) is similar in all respects to the present case. It was there held that it was for the plaintiff to prove that he had a subsisting title. Article 142 of the Limitation Act applies to such a case; *Chiranji Mal* v. *Nathia* (6).

Pandit *Shiam Krishna Dar* was heard in reply.

CHAMIER and PIGGOTT, JJ.—This was a suit for possession by partition of a half share in a small property described as *Ihata* Nidhan Singh in the city of Koil, and consisting apparently of some waste land and the sites of a few houses.

The property belonged formerly to two brothers, Nihal Singh and Bhawani Singh. The rights of the former passed to his three grandsons, who in May, 1909, alleging that they were owners of the whole property, sold the whole to the appellant. The appellant admits, however, that by his purchase he acquired only a half share in the property. The rights of Bhawani Singh

(1) (1910) 20 M. L. J., 323.
(2) (1897) I. L. R., 21 Mad., 153 (162, 165).
(3) (1910) I. L. R., 32 All., 29.
(4) (1892) I. L. R., 14 All., 193.
(5) (1907) I. L. R., 29 All., 479.
(6) (1907) 4 A. L. J., 473.

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in the other half passed to his son Mathura Prasad, and later in execution of a decree against Mathura Prasad, were sold to two persons who in August, 1909, transferred them to the respondents.

The appellant's case is that he was in possession of his half share till March, 1911, when the respondents denied his title. The defence was that the appellant or the persons through whom he claims have not been in possession of the share within 12 years of this suit and that the respondents have been in adverse possession of the same for more than that period.

The Munsif found that, as the appellant had failed to prove possession within twelve years, the suit failed, although the respondents had failed to prove adverse possession by them for more than a very short time. On appeal the Additional District Judge agreed with the Munsif that the appellant had failed to prove possession within limitation, and therefore held that the suit had been rightly dismissed. He went on to hold that as the possession of one of two co-owners could not be regarded as the possession of the other co-owners, the possession of the respondents must be held to have been adverse to the appellant.

In second appeal the learned vakil for the appellant did not dispute the correctness of the rule laid down in *Jafar Husain* v. *Mashuq Ali* (1), that, where a suit for possession of immovable property is resisted by a plea of adverse possession for more than 12 years, the question of limitation becomes a question of title, and it lies upon the plaintiff in the first instance, to give satisfactory *primâ facie* evidence of possession within 12 years of the suit, but he contended that, as the appellant and the respondents are, as their predecessors were, co-owners, or as English lawyers would say tenants in common of the property, the possession of the respondents was in law that of their co-owner, the appellant, and therefore the suit must be held to have been brought within time, as the respondents have not proved ouster or anything equivalent to ouster of the appellant. Many cases were cited in support of this contention, including that of *Jogendra Nath Rai* v. *Baladeo Das* (2), which seems to go the whole length of this contention.

The learned vakil for the respondents referred us to a number of cases, including two decided by single Judges of this

(1) (1892) I. L. R., 14 All., 193. (2) (1907) I. L. R., 35 Calc., 961.

Court, namely, *Deba* v. *Rohtagi Mal* (1) and *Chiranji Mal* v. *Nathia* (2), which are not distinguishable in principle from the case now before us and certainly support the contention advanced on behalf of the respondents.

We are relieved from the necessity of discussing these cases, for it seems to us that the question is covered by the decision of their Lordships of the Privy Council in a Ceylon case to which our attention was drawn after the conclusion of the arguments, namely, that of *Corea* v. *Appuhamy* (3). The plaintiff in the suit had acquired the rights of Balohamy, a daughter of a man named Elias, who died in 1878 leaving as his heirs Balohamy, two other daughters, and a son named Iseris, the principal defendant to the suit. Iseris was in jail when his father died. He came out in December, 1878, and took possession of the whole of the property belonging to himself and his sisters. Balohamy sued for possession in 1908 and Iseris pleaded adverse possession for more than the prescribed period. The plaintiff tried to prove an acknowledgment of her title by Iseris, but failed. Iseris proved only long continued possession on his part of the whole property. The Ceylon courts decided in favour of the defendant, but their decisions were reversed by the Privy Council. It appears to us that the ground upon which their Lordships decided in favour of the plaintiff has no reference to the special terms of the Ceylon Ordinance. It was that the possession of Iseris was in law the possession of his co-owners and that nothing short of ouster or something equivalent to ouster could put an end to that possession. Even the fact that Iseris had for years pretended that he was sole heir of his father and had sworn that the plaintiff was not his sister at all was not considered to justify a presumption of ouster.

The case before the Privy Council was a much stronger case than the one now before us. Here there is nothing to show that the respondents denied the appellant's title till shortly before the suit was brought and there is nothing to show that the respondents' predecessors in title ever laid claim to more than a half share in the property. On the contrary they did not attempt to transfer to

(1) (1903) I. L. R., 28 All., 479. (2) (1907) 4 A. L. J., 473.

(3) L. R., (1912) A. C., 230.

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the respondents more than a half share. In these circumstances it must be presumed that when the respondents took possession of the whole property they did so for themselves and their co-owner.

The judgement of their Lordships recognizes that there may be cases of an exceptional nature in which ouster may be presumed, but we can discover no ground whatever for treating this case as falling in that category. On the contrary, as already pointed out, the respondents' vendors seem to have laid claim to no more than a half share in the property, though they may have been in possession of the whole.

In our opinion the appellant was entitled to rely upon the presumption that possession was held by respondents and their predecessors in title on his behalf and it lay upon the respondents to prove that they or their predecessors had set up an adverse title to the appellant's share to the knowledge of the appellant more than twelve years before the suit. This they failed to do.

We allow this appeal, set aside the decree of the lower appellate court and remand the case to that court for decision on the merits. Costs of this appeal will be costs in the cause.

Appeal decreed and cause remanded.

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January, 12.

Before Mr. Justice Chamier and Mr. Justice Piggott.

MATHURA PRASAD (APPLICANT) v. RAM CHARAN LAL (OPPOSITE PARTY.)*

Civil Procedure Code (1908), order IX, rule 13—Decree ex parte—*Application to set aside decree—Appeal—Decree confirmed in appeal before hearing of application to set it aside.*

When the High Court has once confirmed a decree on appeal, it is not open to the court which passed the decree to entertain an application to set the decree aside, and it makes no difference that the application to set the decree aside was filed before the appeal was disposed of.

THIS appeal arose out of a suit for sale upon a mortgage. In that suit a decree was passed against several defendants. One of the defendants, as against whom the decree was *ex parte*, applied to have the decree set aside under order IX, rule 13, of the Code of Civil Procedure. Some time after this application had been filed the defendants who had contested the suit appealed against the

* First Appeal No. 46 of 1914, from an order of Abdul Ali, Additional Subordinate Judge of Cawnpore, dated the 23rd of December, 1913.

decree. When the application for restoration came on for hearing it was found that the record of the case had gone up to the appellate court. The hearing of the application was postponed from time to time on the ground that the record had not come back from the appellate court. After the appeal had been decided and the record had come back, the court took up the application and dismissed it on the ground that it had no jurisdiction to set aside the decree after it had been confirmed by the appellate court. The applicant appealed from this order.

Munshi *Benode Behari*, for the appellant:—

When application for setting aside the *ex parte* decree was made in the original court no appeal against the decree had been filed. That court certainly had jurisdiction to entertain the application. The fact that subsequently an appeal was filed against the decree and was pending in the appellate court when the application came on for hearing did not deprive the original court of its jurisdiction to deal with the application; *Kumud Nath Roy Chowdhury* v. *Jotindra Nath Chowdhury* (1), *Damodar Manna* v. *Sarat Chandra Dhal* (2) and *Chenna Reddi* v. *Peddaobi Reddi* (3).

Pandit *Baldeo Ram Dave*, (for the Hon'ble Dr. *Sundar Lal*), for the respondent:—

When a decree has been appealed against and while the appeal is pending the original court cannot continue to exercise jurisdiction at the instance of any of the defendants against whom the decree was *ex parte*. The power of that court to deal in any way with the litigation is completely in abeyance except only to execute the decree; *Ramanadhan Chetti* v. *Narayanan Chetty* (4), *Dhonai Sardar* v. *Tarak Nath Chowdhury* (5).

At all events, after the appeal has been decided the original decree ceases to exist and becomes merged in the appellate decree; and the original court cannot, thereafter, alter, amend or interfere with the original decree; *Brij Narain* v. *Tejbal Bikram Bahadur* (6), *Sankara Bhatta* v. *Subraya Bhatta* (7), *Dhonai Sardar* v. *Tarak Nath Chowdhury* (5).

(1) (1911) I. L. R., 38 Calc., 394.
(2) (1909) 13 C. W. N., 646.
(3) (1909) I. L. R., 32 Mad., 416.
(4) (1904) I. L. R., 27 Mad., 602.
(5) (1910) 12 C. L. J., 53.
(6) (1910) I. L. R., 32 All., 295.
(7) (1907) I. L. R., 30 Mad., 535.

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the respondents more than a half share. In these circumstances it must be presumed that when the respondents took possession of the whole property they did so for themselves and their co-owner.

The judgement of their Lordships recognizes that there may be cases of an exceptional nature in which ouster may be presumed, but we can discover no ground whatever for treating this case as falling in that category. On the contrary, as already pointed out, the respondents' vendors seem to have laid claim to no more than a half share in the property, though they may have been in possession of the whole.

In our opinion the appellant was entitled to rely upon the presumption that possession was held by respondents and their predecessors in title on his behalf and it lay upon the respondents to prove that they or their predecessors had set up an adverse title to the appellant's share to the knowledge of the appellant more than twelve years before the suit. This they failed to do.

We allow this appeal, set aside the decree of the lower appellate court and remand the case to that court for decision on the merits. Costs of this appeal will be costs in the cause.

Appeal decreed and cause remanded.

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decree. When the application for restoration came on for hearing it was found that the record of the case had gone up to the appellate court. The hearing of the application was postponed from time to time on the ground that the record had not come back from the appellate court. After the appeal had been decided and the record had come back, the court took up the application and dismissed it on the ground that it had no jurisdiction to set aside the decree after it had been confirmed by the appellate court. The applicant appealed from this order.

Munshi *Benode Behari*, for the appellant:—

When application for setting aside the *ex parte* decree was made in the original court no appeal against the decree had been filed. That court certainly had jurisdiction to entertain the application. The fact that subsequently an appeal was filed against the decree and was pending in the appellate court when the application came on for hearing did not deprive the original court of its jurisdiction to deal with the application; *Kumud Nath Roy Chowdhury* v. *Jotindra Nath Chowdhury* (1), *Damodar Manna* v. *Sarat Chandra Dhal* (2) and *Chenna Reddi* v. *Peddaobi Reddi* (3).

Pandit *Baldeo Ram Dave*, (for the Hon'ble Dr. *Sundar Lal*), for the respondent:—

When a decree has been appealed against and while the appeal is pending the original court cannot continue to exercise jurisdiction at the instance of any of the defendants against whom the decree was *ex parte*. The power of that court to deal in any way with the litigation is completely in abeyance except only to execute the decree; *Ramanadhan Chetti* v. *Narayanan Chetty* (4), *Dhonai Sardar* v. *Tarak Nath Chowdhury* (5).

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(6) (1910) I. L. R., 32 All., 295.
(7) (1907) I. L. R., 30 Mad., 535.

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the respondents more than a half share. In these circumstances it must be presumed that when the respondents took possession of the whole property they did so for themselves and their co-owner.

The judgement of their Lordships recognizes that there may be cases of an exceptional nature in which ouster may be presumed, but we can discover no ground whatever for treating this case as falling in that category. On the contrary, as already pointed out, the respondents' vendors seem to have laid claim to no more than a half share in the property, though they may have been in possession of the whole.

In our opinion the appellant was entitled to rely upon the presumption that possession was held by respondents and their predecessors in title on his behalf and it lay upon the respondents to prove that they or their predecessors had set up an adverse title to the appellant's share to the knowledge of the appellant more than twelve years before the suit. This they failed to do.

We allow this appeal, set aside the decree of the lower appellate court and remand the case to that court for decision on the merits. Costs of this appeal will be costs in the cause.

Appeal decreed and cause remanded.

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Munshi *Benode Behari*, for the appellant:—

When application for setting aside the *ex parte* decree was made in the original court no appeal against the decree had been filed. That court certainly had jurisdiction to entertain the application. The fact that subsequently an appeal was filed against the decree and was pending in the appellate court when the application came on for hearing did not deprive the original court of its jurisdiction to deal with the application; *Kumud Nath Roy Chowdhury* v. *Jotindra Nath Chowdhury* (1), *Damodar Manna* v. *Sarat Chandra Dhal* (2) and *Chenna Reddi* v. *Peddaobi Reddi* (3).

Pandit *Baldeo Ram Dave*, (for the Hon'ble Dr. *Sundar Lal*), for the respondent:—

When a decree has been appealed against and while the appeal is pending the original court cannot continue to exercise jurisdiction at the instance of any of the defendants against whom the decree was *ex parte*. The power of that court to deal in any way with the litigation is completely in abeyance except only to execute the decree; *Ramanadhan Chetti* v. *Narayanan Chetty* (4), *Dhonai Sardar* v. *Tarak Nath Chowdhury* (5).

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(1) (1911) I. L. R., 38 Calc., 394.
(2) (1909) 13 C. W. N., 842.
(3) (1909) I. L. R., 32 Mad., [illegible]
(4) ([illegible]) I. L. R., 27 Mad., [illegible]
(5) ([illegible]) 12 C. L. J., [illegible]
(6) ([illegible]) I. L. R., 32 All., [illegible]
(7) ([illegible]) I. L. R., 30 Mad., [illegible]

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This was also pointed out in the case in I. L. R., 38 Calc., 394 cited by the appellant. In the case in 13 C. W. N., 846, the appeal was pending.

Munshi *Benode Behari*, in reply—

In the present case the application for restoration was filed before the appeal was filed. That is a distinguishing feature. The lower court should have proceeded to try and dispose of the application on the merits. It was no fault of the appellant that the court put off the hearing of the application again and again, and waited until after the appeal was decided. The appellant has been wrongly deprived of his remedy.

CHAMIER and PIGGOTT, JJ.—This is an appeal against an order of the Additional Subordinate Judge of Cawnpore, dismissing an application presented by the appellant to have a decree passed against him *ex parte* set aside on the ground that he received no notice of the institution of the suit. It appears that the suit was one on a mortgage and that there were several defendants including the present appellant. The case was decided by the court of first instance on the 20th of September, 1911. On the 30th of November, 1911, the present appellant presented his application to have the decree set aside as against him. When the application was called on for hearing it was discovered that the file of the original suit had been sent to this Court in consequence of an appeal which had been filed by other defendants. The hearing of the application was put off from time to time, the court apparently being of opinion that it was unnecessary or impossible to take up the application until after the appeal had been disposed of by this Court. The appeal was disposed of by this Court on the 24th of February, 1913, and after the record had been returned to the court below the applicant's application was taken up. It was dismissed by the Subordinate Judge on the ground that he had no jurisdiction to alter or set aside the decree passed by him inasmuch as it had been confirmed by and become, as he says, merged in the decree passed by this Court. We have been referred to several decisions bearing on the question whether a court of first instance has power to alter or set aside its decree after an appeal has been filed against that decree. There seems to be some difference of opinion on the question whether a

lower court can entertain an application for review or to set aside or alter its decree while an appeal against the decree is pending in a superior court, but all the authorities seem to be agreed that when a decree has been passed by the superior court the lower court cannot alter or amend its decree. In the present case as shown above the application of the applicant was made before the appeal was filed to this Court and it may be that even after the appeal was filed the Subordinate Judge might have disposed of the application. But now that the decree of the lower court has been superseded by the decree of this Court we feel bound to hold that the Subordinate Judge has acted rightly in rejecting the application. It seems to us that the appellant ought to have insisted on having his application heard, and, if the Subordinate Judge declined to take up the application, he should have applied to this Court for an order requiring the Subordinate Judge to take up the application, or he should have presented an original application to this Court to set aside the *ex parte* decree. As matters now stand nothing can be done; the appeal must be dismissed.

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The respondent contends that the appeal has been undervalued. The valuation of the original suit was over Rs. 5,000, and a decree was passed in favour of the plaintiff for over Rs. 6,000, and it is contended that the proper valuation of this appeal is the amount of the decree passed on the mortgage. We are not prepared to accept this contention. The appellant is interested only in a small portion of the mortgaged property which he says he purchased in execution of a decree passed before the mortgage in suit. The measure of his interest in the suit appears to us to be the value of the property which he held. He valued his appeal at Rs. 200 and there is nothing to show that this valuation is erroneous. The appeal is dismissed with costs.

Appeal dismissed.

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January, 12.

Before Mr. Justice Chamier and Mr. Justice Piggott.

POTHI RAM AND OTHERS (DEFENDANTS) *v.* ISLAM FATIMA AND OTHERS (PLAINTIFFS.)*

Act No. IX of 1872 (Indian Contract Act), section 27—Agreement in restraint of trade—Mutual agreement between two neighbouring land-owners not to hold cattle markets on the same day.

Held that an agreement entered into by an owner of land with the owner of adjoining land, to the effect that a market for the sale of cattle should not be held on the same day on the lands of both of them, is not an agreement to which the principle of section 27 of the Indian Contract Act, 1872, applies.

THE parties to this case were the owners of two neighbouring villages. A cattle market used to be held in each village on Tuesdays and Saturdays. This identity of days caused mutual loss and recrimination. A settlement was effected, and an agreement was entered into, to the effect that the plaintiff would hold the market in her village on Tuesdays and not on Saturdays, and the defendant would hold it in his on Saturdays and not on Tuesdays. The defendant broke the contract by holding the market on both days. The plaintiff sued for damages. The Munsif dismissed the suit, holding that the contract was void under section 27 of the Indian Contract Act. On appeal the Subordinate Judge reversed this decision and remanded the suit for trial on the merits, holding that the agreement was not in restraint of any trade, profession or business, and that it tended to secure peace and lessen competition and was for the benefit of both parties. The defendant appealed to the High Court.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the appellants:—

The agreement being in restraint of business is void under the provisions of section 27 of the Indian Contract Act. Any restriction, however partial it may be, is void unless the case falls within the three exceptions mentioned in section 27. If the agreement does not come within those exceptions then no considerations of reasonableness or mutual benefit can make the restraint valid. Whether the restraint be general or partial, unqualified or qualified, if it is in the nature of a restraint of trade or business, it is void; *Madhub Chunder Poramanick* v. *Raj Coomar Doss* (1), *Shaikh Kalu* v. *Ram Saran Bhagat* (2). The business which the

* First Appeal No. 176 of 1914, from an order of Guru Prasad Dube, Additional Subordinate Judge of Bareilly, dated the 1st of September, 1914.

(1) (1874) 22 W. R., 370. (2) (1909) 13 C. W. N., 288.

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agreement is in restraint of is the business of deriving gain or profit from allowing a market to be held on the defendant's land. He derives gain in the shape of rent or tolls for the use and occupation of his land. The word "business" is one of very general import. The use of the word "business of any kind" in section 27 is intended to give the term "business" its widest possible scope. Anything which occupies the time and attention and labour of a man for the purpose of profit is business. Any act having for its object the acquisition of gain comes within the term; *Smith* v. *Anderson*, (1).

The appeal was summarily dismissed.

CHAMIER and PIGGOTT, JJ.—The question raised by this appeal is the applicability of the principle laid down in section 27 of the Indian Contract Act (IX of 1872) to the circumstances of this particular case. It is alleged that the defendants, who are land-holders, had entered into a contract with certain neighbouring land-holders, as to the holding of markets on their respective lands. The plaintiffs sued for enforcement of this contract and for damages. The first court threw out the case on the finding that the agreement was void, in that it was an agreement restraining the defendants from exercising a lawful profession, trade or business, and that, consequently, it was not necessary to go into any of the other questions raised by the pleadings. The lower appellate court has reversed this decision and remanded the case for trial on the merits. *The question is whether the owner of land entering* into an agreement with the owner of neighbouring land, to the effect that a market for sale of cattle shall not be held on the same day on the lands of both of them is entering into an agreement which is void under section 27 aforesaid. It seems to us that a landlord who, in return for market tolls or fees, allows a cattle-market to be conducted on his land is not thereby exercising the trade or business of selling cattle. If he is exercising any business at all, he is exercising the business of a land-holder, and the agreement on his part not to allow his land to be used for some particular purpose on some particular day is not an agreement restraining him from exercising his lawful profession, trade or

(1) L. R., (1880) 15 Ch. D., 247 (258)

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business. These considerations are sufficient to dispose of this appeal. It is accordingly dismissed.

Appeal dismissed.

1915 January, 19.

Before Mr. Tudball and Mr. Justice Piggott.

INDAR PAL AND ANOTHER (OBJECTORS) v. THE IMPERIAL BANK (DECREE-HOLDER) *

Hindu law—Joint Hindu family—Suit against father—Son's position and rights in execution proceedings.

A creditor who has obtained a decree against the father of a joint Hindu family, is entitled to put to sale the family property. The son whose interests are threatened is entitled to an opportunity of contesting both the factum and the nature of the debt, and there is nothing in law to prevent him from coming into court in the execution department and preventing, if possible, on these two grounds the passing of his interest to the auction purchaser. If the points are decided against him, the court in execution can put the property to sale. *Shiam Lal* v. *Ganeshi Lal* (1) and *Channu Tewari* v. *Dwarka* (2) followed. *Nanomi Babuasins* v. *Modhun Mohun* (3) referred to.

Per PIGGOTT, J.—A creditor who at first made the sons of his debtor parties to a suit against the latter but subsequently withdrew the suit as against them, would be in no worse position as regards the execution of his decree than he would have occupied if the sons had not been impleaded.

THE facts of this case were as follows :—

One Moti Lal, the father of Indar Pal and Sham Lal, borrowed money on a promissory note from the Imperial Bank, which brought a suit against him making the sons also defendants, but subsequently exempted the sons and obtained a decree against him and attached the joint family property of the judgement-debtor and his sons. The sons put in objections to the effect that part of the attached property had come to them by partition and that it could not be attached as Moti Lal's property. The court below found that the alleged partition was a bogus transaction, and, holding that the joint family property could be attached in execution of the decree against the father, allowed execution to proceed. The objectors, i.e., the sons, appealed.

Dr. *Surendra Nath Sen*, for the appellants :—

The question is not one of substantive law but one of procedure only. The son may be liable for the father's debt, but a decree

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* First Appeal No. 239 of 1913, from an order of A. W. R. Cole, First Additional Judge of Aligarh, dated the 24th of November, 1913.

(1) (1906) I. L. R., 28 All., 288. (2) (1906) 3 A. L. J., 433.

(3) (1885) I. L. R., 13 Calc., 21.

passed against the father cannot be executed against the son. Order XXI, rule 30, of the present Code of Civil Procedure lays down that a person against whom a decree has been passed may be detained or the decree may be executed against his person or property. Section 47 of the Code was also referred to The sons are neither judgement-debtors under the decree nor are they the legal representatives of the father. The attachment of the son's property in execution of decree against the father militates against the provisions of order XXI, rule 30. The son may be liable under the personal law to pay his father's debts, but in the absence of a decree, the liability cannot be enforced on the execution side. On the evidence the father's share in the ancestral property has been separated on partition.

Babu *Durga Charan Banerji*, for the respondent:—

The remedy of a creditor of a Hindu father is to proceed against the joint family property and the son cannot escape liability merely because he is not a party to the decree, unless he can show that the debt was tained with immorality. *Shiam Lal* v. *Ganeshi Lal* (1), *Channu Tewari* v. *Dwarka* (2). The principle of law is that, so far as the creditor is concerned, he can proceed not only against the share of the father but also against the share of the son, he being under a pious duty to pay his father's debts; *Nanomi Babuasin* v. *Modhun Mohun* (3), Mayne p. 331, page 426.

Dr. *Surendra Nath Sen*, was heard in reply.

TUDBALL, J.—The respondent in this appeal is the Official Liquidator of the Imperial Bank of Aligarh and this appeal arises out of execution proceedings taken under a decree obtained by the Bank, on the 24th of April, 1910, against one Moti Lal, the father of the two appellants, on the basis of a promissory note, executed by Moti Lal alone. The sons were also impleaded as defendants to the suit, but as they were not parties to the promissory note, the suit as against them was withdrawn.

The family to which Moti Lal belonged consisted of himself and the two sons and his brother, and thus Moti Lal on partition would have been entitled to a one-sixth share. When the decree was

(1) (1905) I. L. R., 23 All., 283 (2) (1906) 3 A. L. J., 432.

(3) (1885) I. L. R., 13 Calc., 21.

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obtained it was put into execution and the interest of Moti Lal, i.e., a one-sixth share in certain property was put to sale. It was again put into execution, as this did not satisfy the decree against Moti Lal and the decree-holder sought to put the remaining five-sixths share to sale. The brother Babu Lal and the two sons filed objections. Those of Babu Lal were allowed and his share was released. The objections of the two sons were disallowed and hence the present appeal.

The ground of objection in the court below as entered in the petition filed jointly by the brother and sons, was merely that the attached property belonged *to the objectors and not to the* judgement-debtor and was therefore not liable to be sold. The lower court's judgement, however, shows that the case presented to it was :—

(1) That there had been a partition in July, 1910, i.e., just after the Bank's decree had been obtained, under which Moti Lal had separated, leaving his sons still joint with his brother and therefore the attached property was not liable.

(2) That the liability of the son's share was *res judicata* because the Bank after making the sons parties to the suit withdrew it as against them.

The court below held (1) that the alleged partition was one collusively and fraudulently made, if at all, to defeat the creditor and therefore could not rid the sons of their liability for the father's debt, quoting the ruling in *Krishnasami Konan* v. *Ramasami Ayyar* (1), and (2) that the rule of *res judicata* did not apply to the circumstances of the case.

In their memorandum of appeal the grounds taken are really only three in number. The first, fourth and fith relate to the partition. The second and third relate to the question of *res judicata*. The sixth is a fresh plea that the debt is not of such a nature as to bind the sons.

At the first hearing of the appeal it was stated that the pleas as to the partition and *res judicata* would not be pressed but at a subsequent hearing it was stated that the plea as to the legal effect of the partition would not be dropped. Nothing has been said on the sixth ground of appeal.

(1) (1899) I. L. R., 22 Mad., 519.

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The plea mainly pressed before us is that the decree-holder, not having obtained a decree against the sons, is not entitled in law to execute the decree against the shares of the sons; that if he wishes to make their shares liable he must bring a separate suit.

The other point taken is that, Moti Lal having separated, the share of the sons is no longer liable for the father's debt and there is no sufficient evidence to show that the partition was a collusive or a colourable transaction. In regard to the former, the present case is very similar to the case of *Shiam Lal* v. *Ganeshi Lal* (1). The facts there were that a Hindu father borrowed money on a promissory note which he alone executed. A suit was instituted against him and his son on the basis of the promissory note. It was dismissed as against the son on the ground that he was no party to the promissory note. It was decreed against the father. In execution of the decree the family property was attached and sold. The son thereupon instituted a suit for a declaration that the decree could not be properly executed against his interest in the family property in view of the fact that the suit had been dismissed against him and for possession of his share. It was held by a Bench of this Court that he was not entitled to any such declaration, as the dismissal of the suit left him in the same position as if he had not been impleaded, i.e., it left him liable as a Hindu son to pay any debt of his father not shown to be tainted with immorality, and as the question of immorality had not been raised his suit must fail. This ruling was followed by BANERJI J. in *Channu Tewari* v. *Dwarka* (2). *Primâ facie* a decree obtained against A cannot be executed by the attachment and sale of B's property, i.e. if B objects. But the position of a son in a joint Hindu family is, by reason of his pious duty to pay his father's debt not incurred for immoral purposes, very different from that of an ordinary third party. In *Nanomi Babuasin* v. *Modhun Mohun* (3) their Lordships of the Privy Council say (at page 35):—"Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for

(1) (1906) I. L. R., 28 All., 288. (2) (1905) 3 A. L. J., 433.

(3) (1885) I. L. R., 13 Calc., 21.

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an antecedent debt *or against his creditors remedies for their debts*, if not tainted with immorality." A creditor having obtained a decree against the father, therefore, is entitled to put to sale the family property, i.e., the court can do that which the father himself would be empowered to do under the law. The son whose interests are threatened is entitled to an opportunity of contesting both the factum and the nature of the debt and there is nothing in law to prevent him from coming into court in the execution department and preventing, if possible, on these two grounds the passing of his interests to the auction purchaser. If the points are decided against him, the court in execution can put the property to sale.

No plea of immorality or non-existence of the debt has been pressed before us, nor indeed is there anything in the suit itself to raise even a suspicion as to the factum or nature of the debt.

In regard to the alleged partition between Moti Lal on the one side and his brother and sons on the other, I would point out that the plea was at first dropped and then revived, and I have no hesitation in holding that if any such partition was formally made it was only a colourable transaction carried through with a view to defraud and defeat the Bank. The facts noted in the lower court's judgement leave no doubt in my mind on this point. The appellants cannot be allowed to defeat the respondent in this manner. In this view it is unnecessary to decide the question whether, if a *boná fide* partition had taken place, the decree-holder would, in execution of his decree obtained against the father alone, be able to attach and sell the son's separate share or whether it would be necessary for him to bring a fresh suit as held in *Krishnasami Konan* v. *Ramasami Ayyar* (1). I do not wish it to be considered that I agree with this ruling. There is a good deal perhaps to be said for the opposite view, but it is unnecessary to decide the point in the view I take of the facts. I would dismiss the appeal.

PIGGOTT, J.—I concur generally, though I should be disposed to insist more strongly than my learned colleague has done on the finding against the alleged partition. That being found against the appellants, the joint family property in the hands of the father

(1) (1899) I. L. R., 22 Mad., 519.

and his sons remains liable, at any rate to the extent of their total shares. If execution had been taken out in the first instance against the shares of the father and the sons, I do not see how the sons could have avoided execution except on proof of the non-existence of the debt or of its being tainted with immorality. The question is whether the creditors are put in a worse position in this particular case by reason of the fact that they brought their suit in the first instance against the father and sons jointly, or by reason of the fact that they took out execution in the first instance against what they described as the father's share in the joint family property. As to the first point, it seems to me that the creditors made a mistake in impleading the sons along with the father, but recognized that mistake in time, and cannot be put in a worse position as regards the execution of their decree than they would have occupied if they had simply sued the father on his unsecured debt and obtained a money decree against him, as they actually did. With regard to the second point I do not think it can be held that the decree-holders, in taking out execution against a certain specified share as the property of Moti Lal, thereby admitted that no other share in the same property was capable of attachment in execution of their decree. Their position admits of being stated thus:—"To the extent of a one-sixth share no one will deny that this property is liable to attachment and sale in execution of our decree: We therefore try, first of all, whether our decree cannot be satisfied by the sale of this share." Finding that the decree could not be so satisfied, they claimed to proceed against the rest of the joint family property. The sons cannot defeat this claim except on grounds which could have been successfully pleaded if the share of the father and that of the sons had been jointly attached in the first instance. I concur in dismissing this appeal.

BY THE COURT:—The order of the Court therefore is that the appeal is dismissed with costs.

Appeal dismissed.

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January, 19.

MISCELLANEOUS CIVIL.

Before Mr Justice Chamier and Mr. Justice Piggott.

MUNICIPAL BOARD OF AJMERE (DEFENDANT) *v.* KIFAYATULLAH (PLAINTIFF.)*

Regulation No. V of 1886 (Ajmere Municipalities), sections 85 and 141—Municipal Board—Powers of Board in respec of erection of buildings—Suit against Municipal Board—Jurisdiction.

One Kifayat-ullah served the Municipal Board of Ajmere with notice of his intention to rebuild a certain wall. He received no reply to this notice within a month, and thereafter commenced to build. The Municipal Board then required him to stop the building and submit a fresh application. The applicant stopped the building, but did not present a fresh application, and some months later sued the Board for damages on account of the stoppage of the building. The Board failed to prove that the notice first given by Kifayat-ullah was not in accordance with law.

Held that in the circumstances the original notice must be considered as a good notice under section 85 of the Ajmere Regulation, I of 1877, and that section 140 of the Regulation, if it applied at all, did not oust the jurisdiction of the Civil Court to try the suit for damages.

THIS was a reference made by the Commissioner, Ajmere-Merwara, under section 18 of the Ajmere Courts Regulation, I of 1877. The facts are fully set forth in the judgement. Shortly stated, they were as follows:—The plaintiff, wishing to rebuild a wall of his cattle-shed situate within the Ajmere Municipality, gave the notice required by section 85 (1) of the Ajmere Municipal Regulation (V of 1886). Not hearing anything from the Municipality within a month thereafter, he proceeded to re-build the wall. Afterwards the Municipality issued a notice to him saying that he had commenced to build in contravention of section 85 (1) and he must stop the work. He stopped the work accordingly, and then sued the Municipality for a declaration that the notice issued by it was illegal, and for Rs. 30 as damages. The Municipality pleaded, *inter alia*, that the suit was not maintainable in the Civil Courts. The suit was decreed and the decree was upheld in appeal by the Commissioner (also District Judge). The defendant Municipality then applied for and obtained a reference to the High Court of the question whether the suit was maintainable.

Babu *Sarat Chandra Chaudhri*, for the defendant applicant:—

The matter in suit being one within the special and peculiar discretion of the Municipal Board and they not having exercised

*Civil Miscellaneous No. 252 of 1914.

this discretion, the Civil Courts have no power to interfere with this exercise of the absolute discretion vested in them. The heading of the chapter in which section 85 occurs shows that it is a matter of sanitation and public safety and convenience; these matters are regulated by the Municipality and their jurisdiction should not be encroached upon by the Civil Courts. The words "within one month" in section 85, clause (1), refer to the words "shall obey." Even if they be construed to refer to the words "directions, . . . given by the Committee" that would not mean that if the Municipality did not issue any directions within a month the person wishing to build would have an absolute right to build in any way he pleased. There is no provision in the Ajmere Municipal Regulation that if the Municipality does not give any reply within one month then it should be deemed to have approved of the proposed building absolutely. Section 141 provides a special remedy in cases where the Municipality has exceeded its powers and acted illegally. In such cases the matter is to be decided by the Commissioner or District Magistrate; when this special remedy is provided by the Act the ordinary courts have no jurisdiction in such matters.

Munshi *Damodar Das*, for the plaintiff opposite party, was not heard.

CHAMIER and PIGGOTT, JJ.—This is a reference by the Commissioner of Ajmere-Merwara, under section 18 of the Ajmere Courts Regulation I of 1877. The facts stated in the reference are that one Kifayatullah on the 23rd of July, 1907, gave the Municipal Committee of Ajmere notice in writing of his intention to re-erect a certain building within the limits of the Ajmere Municipality and with his application submitted a certain plan. On the 2nd of October, 1907, the Municipal Committee issued a notice to Kifayatullah to the effect that he had contravened the provisions of section 85 of the Municipal Regulation by beginning to re-erect without permission, and required him to stop the work at once and submit an application for permission to build along with a plan. He was further told not to resume building until he received the orders of the Committee, for, if the Committee found that the proposed building was objectionable, it would have to be removed. On receipt of this notice Kifayatullah stopped the

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work. On the 10th of March, 1908, Kifayatullah brought a suit for recovery of Rs. 30, on account of damage which he alleged he had suffered in consequence of the Municipal Committee having stopped the work and for a declaration that the notice was invalid. The Subordinate Judge gave the plaintiff a decree and his decree was affirmed on appeal by the Commissioner; but on an application made by the Municipal Committee under section 17 of the Ajmere Courts Regulation, the Commissioner has referred to this Court the question whether the suit was maintainable. The contention of the Municipal Committee appears to be that, as it is invested by the Municipal Regulation with a wide discretion in matters of this kind, no suit can be maintained in a Civil Court with regard to them. Section 85 of the Municipal Regulation lays down that every person intending to erect or re-erect any building shall, if required to do so by rules made by the Committee in this behalf, give notice in writing of his intention to the Committee and shall, if required to do so, submit a plan showing the level at which the foundation and the lowest floor are proposed to be laid and a specification of the works intended to be constructed and the materials to be used, and shall obey all written directions consistent with the Regulation given by the Committee within one month after receiving such notice either prohibiting the erection or re-erection or in respect of a number of other matters detailed in the section. An attempt was made in the court of the Commissioner to show that the notice given by Kifayatullah did not comply with the section. The Commissioner declined to allow this point to be taken for the first time in appeal and we must assume that the notice given in this case complied with the requirements of the law. As we read section 85, if the Municipal Committee wishes to prohibit the erection or the re-erection of a building, or to give directions with respect to any of the matters detailed in the section, it must issue its directions within one month after receiving the notice. In the present case the Municipal Committee allowed more than one month to elapse before communicating with Kifayatullah, and, when it did communicate with him, it did not issue a notice, as it might have done under sub-section (2) of the section, requiring the building to be altered or demolished, but it required him to stop the work and

submit a fresh application. If Kifayatullah gave a notice which did not comply with the law, it should have been regarded as no notice at all and the Municipal Committee could have required him to alter or demolish the building; but as it must be taken that the notice given was in compliance with the law, and as the Municipal Committee did not issue any directions within one month of the receipt of the notice, the Municipal Committee had no authority to take any action under sub-section 2 of section 85. It was suggested that section 141 of the Regulation barred the jurisdiction of the Civil Court in cases of this kind. That section empowers the Commissioner or the District Magistrate to suspend the action taken by a Municipal Committee or to prohibit the doing of an act which is about to be done in pursuance of or under cover of the Regulation in certain cases. It seems to us doubtful whether section 141 was intended to apply to such cases as this. Even if it can be construed so as to cover such cases we cannot treat it as barring the jurisdiction of a Civil Court to entertain a suit for damages at the instance of a person who has been wronged by an illegal action of the Committee. In our opinion the suit was maintainable and this is our answer to the reference. Let the papers be returned.

APPELLATE CIVIL.

1915
January, 22.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

KANHAI RAM (DEFENDANT) v. DURGA PRASAD AND ANOTHER (PLAINTIFFS)*

Act (Local) No II of 1901 (*Agra Tenancy Act*), *section* 95—*Jurisdiction—Civil and Revenue Courts*—Res judicata—*Dispute between two rival claimants to a holding*

A sued B for ejectment in a Court of Revenue, alleging that B was his sub-tenant, and obtained a decree. B then sued in the Civil Court for a declaration that he was the owner of a certain occupancy holding and for possession if he was found not to be in possession.

Held (1) that B's suit was properly triable by a Civil Court and not by a Court of Revenue and (2) that the previous judgment of the Court of Revenue ejecting B could not operate as *res judicata*.

Neither was the suit barred by section 95 of the Agra Tenancy Act, 1901. That section deals with questions arising between landlord and tenant, and

*Appeal No 62 of 1914 under section 10 of the Letters Patent.

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not between rival claimants to a tenancy. *Jagannath* v. *Ajudhia Singh* (1) followed. *Diwan Singh* v. *Randhera* (2) overruled.

THE facts out of which this appeal arose were as follows:—

The defendant in the present suit brought a suit in the Revenue Court against the plaintiff in the present suit alleging that he was his sub-tenant and seeking to eject him. The Revenue Court granted him a decree. The defendant in the Revenue Court then brought the present suit, in which he claimed that he was entitled to a certain occupancy holding and for possession if he was found not to be in possession. Both the courts below dismissed the suit on the ground that it was not maintainable. The plaintiff appealed to the High Court, and his appeal coming before a single Judge of the Court was decreed by the following judgement:—

"I have carefully considered the judgement of the court below. Whether a suit like the one brought by the plaintiff lies at all is a matter of some controversy so far as the decided cases are concerned. My own view is that a suit like this is not prohibited by the provisions of the Agra Tenancy Act. But it is a question whether the finding arrived at in the former suit between the parties in the Revenue Court should not operate as *res judicata*. The question was considered by Mr. Justice CHAMIER in S. A. No. 1001 of 1911. Like him, I am inclined to think that the matter should be deemed to be *res judicata*. But a Division Bench of this Court in a Letters Patent Appeal has taken a contrary view. Sitting as a single Judge I am bound to follow it. I, therefore, allow the appeal, set aside the decrees of the courts below and remand the case to the first court, through the District Judge. That court will restore the suit to its original number in the register and hear and dispose of it according to law. Costs here and hitherto incurred will be costs in the cause."

From this judgement the defendants appealed under section 10 of the Letters Patent.

Munshi *Lakshmi Narain* and Babu *Sital Prasad Ghosh*, for the appellant.

The respondents were not represented.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit which was brought under the following circumstances. The defendant in the present suit brought a suit in the Revenue Court against the plaintiff in the present suit alleging that he was his sub-tenant and seeking to eject him. The Revenue Court granted him a decree. The defendant in the Revenue Court then brought the present suit in which he claimed that he was entitled

(1) (1912) I. L. R., 35 All., 14. (2) (1914) 12 A. L. J., 1322.

to a certain occupancy holding and for possession if he was found not to be in possession. There are other claims which may be disregarded for the purpose of our present judgement. Both the courts below dismissed the plaintiff's claim on the ground that the suit was not maintainable. It was contended that the decision of the Revenue Court operated as *res judicata* and that in any event the present suit was one which could not be maintained in a Civil Court.

On second appeal a learned Judge of this Court held with some reluctance that having regard to the rulings of this Court the decision of the court below was wrong, and he accordingly allowed the appeal and remanded the suit for disposal on the merits. It seems to us that the decision of the learned Judge of this Court was correct.

The plaintiff in the present suit does not allege the existence of the relationship of landlord and tenant between himself and the defendant. His claim is that he is the owner of a certain occupancy tenancy and that the defendant is a trespasser. True it is that if the plaintiff in the present suit is successful the decision in his favour will be inconsistent with the decision of the Revenue Court in favour of the defendant. It seems to us, however, quite clear that the decision of the Revenue Court cannot be relied upon as *res judicata* because the Revenue Court was not competent to try the present suit. If the decision of the Revenue Court cannot be successfully pleaded as *res judicata* then that decision does not render the present suit unmaintainable.

It is next contended that the existing relation between the plaintiff and defendant is one of the matters which could be decided under section 95 of the Tenancy Act. In our opinion this section deals with questions arising between landlord and tenant and not between rival claimants to a tenancy. We have already decided the very point in the case of *Jagannath* v. *Ajudhia Singh* (1).

The decision in the case of *Diwan Singh* v. *Bandhera* (2), is relied upon by the appellant. The learned Judge in that case seems to have been of opinion that the question of title to an occupancy holding arising between rival claimants could be dealt

(1) (1913) I. L. R., [illegible] All., 14 (2) (1914) 12 A. L. J., 1222

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with by the Revenue Court under section 95 of the Tenancy Act. The attention of the learned Judge does not appear to have been drawn to the decision in *Jagannath* v. *Ajudhia Singh* (1), and it is certainly inconsistent with it. We dismiss the appeal but without costs as no one appears for the other side.

Appeal dismissed.

1915
January, 25.

Before Mr. Justice Chamier and Mr. Justice Piggott.

MUHAMMAD MASIHULLAH KHAN AND ANOTHER (PLAINTIFFS) *v.* JARAO BAI AND OTHERS (DEFENDANTS.)*

Civil Procedure Code (1908), order XXII, rule 10—Redemption of mortgage—Preliminary decree—Sale of mortgaged property—Right of purchaser to be made a party to the suit.

A preliminary decree for redemption of a usufructuary mortgage was passed in 1908, but there was an appeal, and the decree of the High Court, which confirmed the decree of the court below, was passed in 1910, and the time for payment of the mortgage money was extended. After the time fixed for payment had expired, but before the final decree was passed, the plaintiff decree-holder sold the mortgaged property, leaving with the purchasers a sum sufficient for redemption.

Held that the suit was still pending at the time of the sale and the purchasers were entitled to have their names entered in the record as plaintiffs. *Bhugwan Das Khettry* v *Nilkanta Ganguli* (2) referred to.

THE facts of this case were as follows:—

A preliminary decree for redemption of a usufructuary mortgage was passed on the 22nd of December, 1908. The decree fixed a certain time within which the money was to be paid into court. On appeal the High Court upheld the decree on the 19th of May, 1910, and extended the time for payment up to the 19th of November, 1910. The money was not paid in by that date. No application was made by the defendant mortgagee under clause (4) of order XXXIV, rule 8, of the Code of Civil Procedure. On the 12th of October, 1912, the plaintiff decree-holder sold the mortgaged property to certain persons and left with them a sum of money sufficient for redemption in accordance with the terms of the decree. The sale-deed did not specifically assign the decree. On the 6th of April, 1914, the vendees applied.

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*First Appeal No. 129 of 1914, from a decree of Banke Behari Lal, Second Additional Subordinate Judge of Aligarh, dated the 30th of August, 1913.

(1) (1912) I. L. R., 35 All., 14. (2) (1904) 9 C. W. N, 171.

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to be substituted as plaintiffs in place of their vendor so that they might pay the decretal amount into court. This application was dismissed and they accordingly appealed to the High Court.

Dr. *S. M. Sulaiman*, (with Mr. *B. E. O'Conor*) for the appellants :—

In spirit and in substance the sale-deed conveys all the rights of the original plaintiff mortgagor, including the benefit of the redemption decree and the right to continue the suit. The mortgagor did not reserve to herself her rights under the redemption decree. That a sufficient portion of the sale consideration was left with the vendees to enable them to obtain redemption in accordance with the terms of the decree shows that it was fully contemplated that the vendees were to get the right to continue the suit so as, by depositing the decretal amount, to obtain the final decree for redemption in their favour. There has thus been a devolution of interest within the meaning of order XXII, rule 10. The suit is still pending. A suit is deemed to be continuing until the essential relief appropriate to the nature of the suit has been obtained; *e. g.*, in a suit for sale upon a mortgage, by sale and confirmation thereof, and in a suit for redemption by actual redemption; *Moti Lal* v. *Preo Nath Mitra* (1). It has been held that a mortgage suit, even after a decree has been made and an order absolute for sale passed, is a pending suit until the sale actually takes place; and section 372 of the old Code of Civil Procedure was held to apply to applications made before sale for substitution of legal representatives; *Bhugwan Das Khettry* v. *Nilkanta Ganguli* (2). The suit continues until an operative decree is passed; *Midnapur Zemindari Co.* v. *Kumar Naresh Narain Roy* (3). I am further supported by the case of *Annamalai Chettiar* v. *Malayandi Appaya Naik* (4). Moreover, the appellate decree of redemption having been passed after the new Code of Civil Procedure came into operation the case is governed by that Code. Order XXXIV, rule 7, read in the light of the explanation to the definition of "decree" in section 2 makes it clear that the suit continues up to the passing of the decree absolute. Order XXII,

(1) (1903) 9 C. L. J., 98. (3) (1911) 16 C. W. N., 109.

(2) (1904) 9 C. W. N., 171. (4) (1906) I. L. R., 29 Mad., [illegible]

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with by the Revenue Court under section 95 of the Tenancy Act. The attention of the learned Judge does not appear to have been drawn to the decision in *Jagannath* v. *Ajudhia Singh* (1), and it is certainly inconsistent with it. We dismiss the appeal but without costs as no one appears for the other side.

Appeal dismissed.

1915
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Before Mr. Justice Chamier and Mr. Justice Piggott.

MUHAMMAD MASIHULLAH KHAN AND ANOTHER (PLAINTIFFS) *v.* JARAO BAI AND OTHERS (DEFENDANTS.)*

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(1) (1912) I. L. R., 35 All., 14. (2) (1904) 9 C. W. N, 171.

to be substituted as plaintiffs in place of their vendor so that they might pay the decretal amount into court. This application was dismissed and they accordingly appealed to the High Court.

Dr. *S. M. Sulaiman*, (with Mr. *B. E. O'Conor*) for the appellants :—

In spirit and in substance the sale-deed conveys all the rights of the original plaintiff mortgagor, including the benefit of the redemption decree and the right to continue the suit. The mortgagor did not reserve to herself her rights under the redemption decree. That a sufficient portion of the sale consideration was left with the vendees to enable them to obtain redemption in accordance with the terms of the decree shows that it was fully contemplated that the vendees were to get the right to continue the suit so as, by depositing the decretal amount, to obtain the final decree for redemption in their favour. There has thus been a devolution of interest within the meaning of order XXII, rule 10. The suit is still pending. A suit is deemed to be continuing until the essential relief appropriate to the nature of the suit has been obtained; *e. g.*, in a suit for sale upon a mortgage, by sale and confirmation thereof, and in a suit for redemption by actual redemption; *Moti Lal* v. *Preo Nath Mitra* (1). It has been held that a mortgage suit, even after a decree has been made and an order absolute for sale passed, is a pending suit until the sale actually takes place; and section 372 of the old Code of Civil Procedure was held to apply to applications made before sale for substitution of legal representatives; *Bhugwan Das Khettry* v. *Nilkanta Ganguli* (2). The suit continues until an operative decree is passed; *Midnapur Zemindari Co.* v. *Kumar Naresh Narain Roy* (3). I am further supported by the case of *Annamalai Chettiar* v. *Malayandi Appaya Naik* (4). Moreover, the appellate decree of redemption having been passed after the new Code of Civil Procedure came into operation the case is governed by that Code. Order XXXIV, rule 7, read in the light of the explanation to the definition of "decree" in section 2 makes it clear that the *suit* continues up to the passing of the decree absolute. Order XXII,

(1) (1908) 9 C. L. J., 96.
(2) (1904) 9 C. W. N., 171.
(3) (1911) 16 C. W. N., 109.
(4) (1906 I. L. R., 29 Mad., 426

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rule 10, applies, therefore, to the case and the application should be granted.

Babu *Durga Charan Banerji*, (with him Pandit *Mohan Lal Sandal*), for the respondents:—

The decree for redemption was passed when the old Code of Civil Procedure was in force. The appellate court merely upheld that decree. The procedure that governs the case is, therefore, that laid down by the old Code. When the decree for redemption was passed on the 22nd of December, 1908, the suit at once came to an end; there was no continuance of the suit after that. The subsequent proceedings for obtaining an order absolute would be of the nature of execution of the decree. Section 372 of the old Code, which correspondents to order XXII, rule 10, did not apply to proceedings after the decree or proceedings in execution; *i.e.*, where the devolution of interest occurred after the passing of the decree; *Goodall* v. *The Mussoorie Bank* (1), *The Collector of Muzaffarnagar* v. *Husaini Begam* (2), *Manmotha Nath Mitter* v. *Rakhal Chandra Tewary* (3), *Raghunath Das* v. *Sundar Das* (4).

The sale-deed transferred the mortgaged property but not the decree. There being no assignment of decree, order XXI, rule 16, cannot apply; *Hansraj Pal* v. *Mukhraji Kunwar* (5). Neither the suit itself nor any execution proceedings were pending in court when the application was made. So order XXII, rule 10, does not apply.

Dr. *S. M. Sulaiman* replied.

CHAMIER and PIGGOTT, JJ.—Musammat Maminna Khatun, on the 22nd of December, 1908, obtained a preliminary decree for redemption. On appeal to this Court the decision was upheld by a decree dated the 19th of May, 1910, which allowed the plaintiff six months from that date to redeem the property. On the 12th of October, 1912, Musammat Maminna Khatun sold the mortgaged property to the present appellants, leaving in their hands a sum of money sufficient to enable them to redeem the property in accordance with the decree. On the 6th of April, 1914, the appellants

(1) (1887) I. L. R., 10 All., 97.
(2) (1895) I. L. R., 18 All., 86.
(3) (1900) 14 C. W. N., 752.
(4) (1914) 18 C. W. N., 1058.
(5) (1907) I. L. R., 30 All., 28.

applied to the court below to be made plaintiffs in the suit in the place of Maminna Khatun, and on the same day they applied to the court to extend the time for redemption and to allow them to pay the mortgage money into court. Both applications were dismissed. This is an appeal against the order dismissing the appellant's application to be made plaintiffs in the suit. The Subordinate Judge seems to have dismissed the application on two grounds, namely, (1) that no execution proceedings were pending at the time when the application was made, therefore order XXII, rule 10, did not apply to the case, and (2) that the decree had not been transferred to the appellants, therefore order XXI, rule 16, did not apply. In appeal it is contended that the suit is still pending, and reliance is placed on a decision of the Calcutta High Court in *Bhugwan Das Khettry* v. *Nilkantha Ganguli* (1) to the effect that a suit of this kind may be "pending" even after the decree absolute. A question has been raised as to whether these proceedings are governed by the new Code of Civil Procedure. It seems to us that the proceedings must be held to be governed by the new Code. It is true that the preliminary decree was passed by the Subordinate Judge in December, 1908, just before the new Code came into force, but the case, as already stated, was brought up to this Court and a decree was passed by this Court in May, 1910, after the passing of the new Code. Before the passing of the new Code there was considerable conflict of judicial opinion on the question whether proceedings after a preliminary decree for sale or redemption should be regarded as proceedings in a suit or as proceedings in execution of a decree. Under the present Code there can be no doubt that such proceedings must be held to be proceedings in a suit. We have no difficulty in holding that the suit with which we are now concerned was still pending within the meaning of order XXII, rule 10, when the appellants' application to be made plaintiffs was filed. In the definition of decree contained in the present Code of Civil Procedure it is explained that a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. This makes it quite clear that a suit of this kind does not come to an end after the passing of a

(1) (1904) 9 C. W. N., 171.

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preliminary decree. In this view it is unnecessary to consider whether order XXII, rule 10, applies to execution preceedings. It was held by this Court that section 372 of the old Code of Civil Procedure did not apply to execution proceedings. It is unnecessary to decide whether order XXII, rule 10, which has taken the place of that section, does or does not apply to execution proceedings. It is sufficient for the present case to say that the suit was still pending when the appellants' application to be made plaintiffs was made.

The only other question is whether there has been a devolution of interest which entitles the present appellants to be made plaintiffs in the suit. The sale-deed executed by Musammat Maminna Khatun transfers the whole of the mortgaged property to the appellants and recites that a part of the price has been left in their hands in order that they may proceed to redeem the property. The sale-deed in fact comes very near being a transfer of the preliminary decree. It is quite clear from the terms of the deed that the parties considered that the purchasers of the property would be entitled to redeem the property in the suit in which the preliminary decree had been passed. Without holding that there had been a definite transfer of the decree, we have no doubt whatever that there has been a devolution of interest which entitles the appellants to be made plaintiffs in the suit. In our opinion the appellants' application should have been allowed. We, therefore, allow this appeal, set aside the order of the court below and direct that the names of the appellants be entered as plaintiffs in the place of Musammat Maminna Khatun. The respondents must pay the appellants' costs.

Appeal allowed.

REVISIONAL CRIMINAL.

1915
January, 28.

Before Mr. Justice Piggott.

EMPEROR *v.* RAJA SINGH AND OTHERS. *

Criminal Procedure Code, sections 106 *and* 32—*Security to keep the peace—Powers of Sub-divisional Magistrate.*

A Sub-divisional Magistrate is, as such, competent to pass an order under section 106 of the Code of Criminal Procedure binding over a person to keep the

* Criminal Revision No. 1202 of 1914, from an order of Durga Dat Joshi, Sessions Judge of Azamgarh, dated the 11th of September, 1914.

peace for period exceeding six months, notwithstanding that, but for his being a Sub divisional Magistrate, he would have only second class powers.

A Sub-divisional Magistrate of the district of Azamgarh, who was a second class Magistrate, having convicted four persons of an offence under section 323 of the Indian Penal Code, passed an order binding them over to keep the peace for the period of one year, and in default, each was to undergo simple imprisonment for one year. The persons so bound over applied in revision to the Sessions Judge to set aside the Magistrate's order upon the ground that it was in excess of the Magistrate's jurisdiction. The Sessions Judge, however, dimissed the application, holding that, as the Magistrate in question was a Sub-divisional Magistrate, he had power to pass the order complained of. The applicants accordingly came in revision to the High Court.

Mr. *R. K. Sorabji*, for the applicants.

The Assistant Government Advocate, (Mr. *R. Malcomson*), for the Crown.

PIGGOTT J.—I must take it from the learned Sessions Judge, who had better opportunity of satisfying himself on the point than this Court can have, that the trying Magistrate, Mr. A. G. Ausan, was a Sub-divisional Magistrate in the district of Azamgarh at the time when this order was passed. The question raised by this application, therefore, is whether a Magistrate of the second class, who is also a Sub-divisional Magistrate, can pass an order under section 106 of the Code of Criminal Procedure binding over a person to keep the peace for a period exceeding six months. The suggestion is that, as such order carries with it an alternative sentence of imprisonment in case security is not filed, the powers of a Magistrate of the second class, even though he may be a Sub-divisional Magistrate, are limited as regards the period of imprisonment by the provisions of section 32 of the Code of Criminal Procedure. I am clearly of opinion that the provisions of section 106 of the Code of Criminal Procedure cannot be limited in this way. The powers therein referred to are conferred upon the court of a Sub-divisional Magistrate, and all that such court does under that section is to require the person convicted to execute a bond with or without sureties for keeping the peace during such p

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exceeding three years as the court may think fit. If the period in question should exceed one year, the provisions of section 123, clause (2), of the Code of Criminal Procedure necessitate a reference to the Sessions Judge; but otherwise detention in prison until the prescribed period expires, or until within such period the required security is furnished, follows under the provisions of clause (1) of the same section, independently of the powers of the Magistrate. So long as the order requiring the applicant in this case to furnish security was passed by a court which had authority to do so under the provisions of section 106 of the Code of Criminal Procedure, and the period for which security was required did not exceed one year, the liability of the applicant to be detained in prison unless he furnished security is something independent of the powers of the Magistrate in the matter of passing substantive sentences of imprisonment. I dismiss this application.

Application dismissed.

APPELLATE CIVIL.

1915
February 5.

Before Mr. Justice Chamier and Mr. Justice Piggott.

AFZAL SHAH (DEFENDANT) v. MUHAMMAD ABDUL KARIM KHAN (PLAINTIFF).*

Act No. XII of 1887 (*Bengal, North-Western Provinces and Assam Civil Courts Act*), *section* 22, *clause* (3)—*Act (Local) No. II of* 1901 (*Agra Tenancy Act*), *section* 197—*Transfer of an appeal in a suit cognizable by a Revenue Court to Subordinate Judge—Powers exercisable by the latter.*

Held that where, under section 22, clause (1) of Act No. XII of 1887, a District Judge transfers an appeal to a Subordinate Judge, the latter may, if the section be applicable, exercise any of the powers vested in an appellate court by section 197 of the Agra Tenancy Act., *Babu Nandan Prasad* v. *Changur* (1) followed.

IN this case a Munsif, holding that a suit pending before him was not cognizable by a Civil Court, had dismissed it. The plaintiff appealed to the District Judge, who transferred the appeal to a Subordinate Judge for disposal. The Subordinate Judge was of opinion that the suit was cognizable by a Civil Court, and accordingly, acting under section 197 of the Agra Tenancy Act, 1901,

* First Appeal No. 108 of 1914 from an order of Shams-ud-din Khan, first Additional Subordinate Judge of Aligarh, dated the 15th of April, 1914.

(1) (1894) I. L. R., 16 All., 363.

set aside the Munsif's decree and remanded the suit for disposal by him. Against this order the defendant appealed to the High Court.

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AFZAL SHAH v. MUHAMMAD ABDUL KARIM KHAN.

Mr. *M. L. Agarwala*, for the appellant.

Maulvi *Shafiuzzaman*, for the respondent.

CHAMIER and PIGGOTT JJ.—This is an appeal against an order of the Additional Subordinate Judge of Aligarh setting aside a decree passed by the Munsif of Bulandshahr and remanding the suit to the Munsif's court to be disposed of according to law. The Munsif had held that the suit was not cognizable by a Civil Court and had on that ground dismissed it. The plaintiff appealed to the District Judge, who transferred the appeal to the first Additional Subordinate Judge for disposal. The latter officer was of opinion that the suit had been rightly instituted in the Civil Court and remanded the case to the Munsif for trial on the merits. In appeal to this Court it is contended that the suit was not cognizable by the Civil Court and that the Subordinate Judge had no power to make the order of remand. It is conceded that if the order of remand had been made by the District Judge, the case would have been covered by section 197 of the Tenancy Act and no objection could have been taken to the order; but it is contended that the Subordinate Judge had no power to act under that section. The case is covered by the decision in the case of *Babu Nandan Prasad* v. *Changur* (1). On the authority of that ruling we must hold that the Additional Subordinate Judge had power to make the order of remand. The appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Tudball and Mr. Justice Rafiq.

1915 *February*, 1.

AMINA BIBI AND OTHERS (DEFENDANTS) *v.* NAJM-UN-NISSA BIBI (PLAINTIFF) AND ROSHAN-UN-NISSA BIBI AND OTHERS (DEFENDANTS).*

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 62—Limitation —Debt due to all the heirs of a deceased recovered by some of them—Suit by remaining heir for recovery of her share

Some of the heirs of a deceased Muhammadan brought a suit upon a mortgage in his favour impleading as a defendant the remaining heir The plaintiffs obtained a decree, and in execution thereof brought the mortgaged

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* First Appeal No. 431 of 1912 from a decree of Hidayat Ali, Officiating Subordinate Judge of Gorakhpur, dated the 24th of August, 1912.

(1) (1894) I. L. R., 16 All., 363 F. B.

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property to sale on the 21st of May, 1906, and purchased it themselves for a sum slightly in excess of the amount of the decree and costs. The decree-holders auction purchasers paid in the excess and got possession. On the 1st of June, 1912, the remaining heir sued to recover her share in the mortgage money, or, in the alternative, a share in the property purchased.

Held that the plaintiff had no cause of action so far as the property was concerned, and that as to the money her suit was barred by article 62 of the first schedule to the Indian Limitation Act, 1908. *Mahomed Wahib* v. *Mahomed Ameer* (1) followed. *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (2) and *Mahomed Riasat Ali* v. *Hasin Banu* (3) referred to.

THE facts of this case were as follows :—

A mortgage was executed in favour of one Minnat-ullah in 1891. Minnat-ullah died leaving his widow, the plaintiff, and his father Khadim Husain as his heirs. Khadim Husain died leaving the defendants his heirs. The defendant Amina Bibi obtained a succession certificate in respect of the debt in question and together with the other defendants brought a suit on the mortgage of 1891 for sale of the property making the present plaintiff a defendant to that suit. A decree for sale was obtained, but before the property was sold the plaintiff applied to be made a decree-holder. The defendants opposed her application, but undertook to pay up her share (one-fourth) on recovery of the sale proceeds. The property was sold and purchased by the decree-holders on the 21st of May, 1906, and the sale was confirmed on the 15th of June, 1906. The sale price was set off against the decretal amount. The plaintiff brought this suit for recovery of one-fourth of the decretal amount together with interest on the 1st of June, 1912, and she prayed in the alternative for possession of a fourth share of the property purchased by the decree-holders. The court below decreed the suit for recovery of money. The defendants appealed.

The Hon'ble Dr. *Sundar Lal* (with him The Hon'ble Mr. *Abdul Rauf*), for the appellants :—

The court below has erred in holding that article 120 applied to this case. That article is applicable only when no other article is applicable. This is a suit for money had and received to the plaintiff's use and article 62 of the Limitation Act applies to this case. The article applies even to cases of constructive receipt. In this case, as the decree-holder purchased

(1) (1905) I. L. R., 32 Calc., 527. (2) (1896) I. L. R., 19 All., 169.

(3) (1893) I. L. R., 21 Calc., 157.

after obtaining the permission of the court and under section 294 of the Code of Civil Procedure, 1882, the amount of the purchase money was set off against the decree. The court entered satisfaction of the decree to that extent. This is in fact and substance a receipt of money by the decree-holder. The case of *Umardaraz Ali* v. *Wilayat Ali* (1) is not in point. In that case, even if article 120 applied, the suit was filed beyond time It could be in time only if the 12 years' period given by article 123 was applicable. The appellant in that case sought to bring his case within that article and the court held that it was not governed by it. That is the only point ruled by that case.

On the application of article 62 the following cases were cited:—*Sobbanna Bhatta* v. *Kunhanna* (2), *Banoo Tewary* v. *Doona Tewary* (3), *Gaya Din* v. *Raj Bansi Kunwar* (4), *Thakur Prasad* v. *Partab* (5), *Sundar Lal* v. *Fakir Chand* (6), and *Mahomed Wahib* v. *Mahomed Ameer* (7).

Mr. *B. E. O'Conor* (with him Maulvi *Iqbal Ahmad*), for the respondent:—

The possession of the defendant who had obtained a certificate to collect debts was that of a trustee. Section 25 of the Succession Certificate Act (VII of 1889) indicates the position of the certificate-holder. This is the legal effect of that section. He is permitted to give a discharge and receive money on behalf of all the heirs of the deceased and thereby undertakes to hold the money for them as a trustee.

Maulvi *Iqbal Ahmad* followed:—

There was no receipt of money in this case and article 62 therefore does not apply.

The Hon'ble Dr. *Sundar Lal*, in reply, relied on the case of *Standish* v. *Rosse* (8), and pointed out that in that case too the money was set off against the price of the property. This was held to be a receipt of money in law. The action was held to be one for money had and received.

(1) (1896) I. L. R., 19 All, 169.
(2) (1907) I. L. R, 30 Mad., 298.
(3) (1896) I. L. R., 24 Calc., 309.
(4) (1880) I. L. R., 3 All, 191.
(5) (1884) I. L. R., 6 All, 442.
(6) (1902) I. L. R., 25 All, 62.
(7) (1905) I. L. R., 32 Calc., 527.
(8) (1849) 3 Ex. R., 527.

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In any case the defendants were entitled to possession of the property; *Kesri* v. *Ganga Sahai* (1). The plaintiff is not entitled to recover any share of the property purchased. It was purchased not only for the mortgage money, but also for costs and a further sum of money paid in cash in which plaintiff had no share. In this case the decree-holders in reply to the plaintiff's application to be made co-decree-holder opposed the application, and said that they would pay the plaintiff only her share of the money. The plaintiff was not bound to take the property in lieu of the decretal money. She was entitled to say that it was a bad bargain and too much had been paid. The decree-holder purchasers could not force a sale on to the plaintiff. There was no mutuality. The case referred to was one in which a decree-holder was executing for himself and his co-decree-holder under section 231 of the Code of Civil Procedure. In such case the executing decree-holder is able to bind the other decree-holders. The plaintiff was entitled to money only as to which she has allowed the claim to be time-barred. She cannot fall back and claim the property.

TUDBALL and RAFIQ JJ.—This and the connected appeal, No. 436 of 1912, arise out of one suit, being cross-appeals from the same decree. The main facts are not in dispute and are as follows:—

Sheikh Minnat-ullah died, leaving as his heirs, his widow, the present plaintiff, and his father, Khadim Husain. Under Muhammadan Law, the widow inherited a one-fourth share in his estate and the other three fourths went to the father. The latter died subsequently, leaving the present six defendants as his heirs.

Under a mortgage-deed, dated the 14th of February, 1891, Nasratullah and Musammat Karamat Bibi borrowed Rs. 7,296 from Minnat-ullah. After the death of Khadim Husain, the first defendant, Musammat Amina Bibi, his widow, obtained a succession certificate in regard to this debt due from the mortgagor. Then she and the remaining defendants jointly sued to recover the mortgage-debt, impleading the present plaintiff as a *pro formâ* defendant admitting that she was entitled to a one-fourth share:

(1) (1911) I. L. R., 33 All., 536.

but alleging that she refused to join as plaintiff. On the 14th of May, 1903, they obtained a decree for the recovery of Rs. 17,168-8-0 plus future interest at 9 per cent. per annum from the date of suit up to the date of payment. In addition to this they were awarded their costs. They put the decree into execution. Thereupon the present plaintiff applied to the court to be added to the proceeding as a decree-holder. To this the decree-holders naturally objected, as she was not a decree-holder, and stated that they would pay her one-fourth of the amount recovered after deducting the costs of the suit and execution proceedings. Her application was disallowed on the 19th of February, 1904. The mortgaged property was put to sale and sold for Rs. 23,590. The decree-holders obtained sanction to bid at the auction.

According to the statements in the plaint and the written statement in this suit, the property was purchased by the defendants Nos. 1 to 3, but it is stated before us that the property was knocked down to all the defendants, and that then the other defendants withdrew, saying that the defendants Nos. 1 to 3 were the purchasers This is of little consequence.

The amount of the debt due under the decree, inclusive of interest, up to the date of sale, was Rs. 22,205-13-0, so that the purchase was for a sum of Rs. 1,384-13-0, in excess of this. The costs of the suit and execution proceedings amounted to a little less than Rs. 1,384-13-0. The purchasers applied under order XXI, rule 72, that the purchase money and the amount due under the decree might be set off against each other and satisfaction of the decree entered up. This was allowed by the court, and they paid into court the small amount which was due on their bid, over and above the total amount of the decree.

The sale was confirmed on the 15th of July, 1906. The present suit was brought by the plaintiff on the 1st of June, 1912, against all the defendants. She sued in the alternative for two reliefs. Primarily she sought to recover Rs. 8,562-3-6, (being Rs. 5,551-7-4, her one-fourth share of Rs. 22,205-13-0) *plus* Rs. 3,010-12-2, interest from 21st of May, 1906, the date of the auction sale up to the date of suit. The date on which the cause of auction arose was given as the 15th of July, 1906, the date of the confirmation of the sale.

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Apparently in apprehension that the date on which the cause of action arose might be taken to be the date of the sale (21st of May, 1906), she alleged that the defendants 1 to 3 had been absent from India on a pilgrimage to Mecca from September, 1911, to March, 1912, (some six months) and that this period should be allowed to her for the purpose of calculating the period of limitation. In the alternative she pleaded that if the first relief could not be granted then she might be awarded possession of a one-fourth share in the property valued at Rs. 5,897-8-0 and be granted mesne profits.

The defendant among other pleas urged—

(1) That the suit for a one-fourth share of the money was barred by limitation.

(2) That the plaintiff was not entitled to recover a share in the property purchased.

(3) That the defendants Nos. 4 to 6 were in any case not liable as they had neither recovered the money nor purchased the property.

The court below held—

(1) That the money claim was not barred by limitation.

(2) That the defendants Nos. 4 to 6, not having received the plaintiff's share of the decretal money or purchased the property in lieu of the decretal money, were not liable to pay anything to the plaintiff.

It came to no decision in regard to the claim for a share in the property. It gave the plaintiff a simple money decree disallowing a part of the claim for interest. The defendants Nos. 1 to 3 have appealed and the point pressed is that the suit for money is barred by limitation as article 62 applies.

The plaintiff has also appealed as against all the defendants, and the sole point she takes is that she is entitled to all the interest she claimed. She does not on her appeal claim that she is entitled to a decree for possession of the one-fourth share in the property.

We take first the question of limitation. The plea taken is that article 62 of the Limitation Act applies, and not article 120 as applied by the court below, to the money claim. In our opinion article 62 clearly applies. The suit is clearly on the face of it, one for money had and received by the defendants for the plaintiff's

use. The court below based its decision that article 120 applied on the authority of the ruling in *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (1). The head note in the report is we think misleading. In that case one heir of a Muhammadan recovered a debt due to her deceased husband. The other heirs sued to recover their shares thereof from the widow. In respect to this claim the court of first instance, applying article 120, held that the suit was barred by limitation, it having been brought more than six years after the cause of action arose. The plaintiff appealed and urged that article 123 applied. This article governs a suit for a legacy or for a share of a residue bequeathed by a testator or for a distributive share of the property of an intestate and allows a period of twelve years. A Bench of this Court repelled this. It held that article 123 refers to a suit in which a plaintiff seeks to obtain his share from a person who either as an executor or an administrator represents the estate of a deceased person and is under a legal obligation to distribute shares to those entitled to them, and that the suit before them was not one of such a nature. They quoted the ruling in *Sithamma* v. *Narayana* (2). They then observed:—"In a recent case decided by their Lordships of the Privy Council, *Mahomed Riasat Ali* v. *Hasin Banu* (3), which was a suit of a nature similar to the present, their Lordships "refused to apply article 123" and held the claim to "be governed by article 120."

Nowhere in the judgement did the Judges who decided this case say that article 120 was the proper article to apply, though perhaps this might be inferred to be their opinion from the passage quoted above. Article 62 was not mentioned in the judgement nor apparently was the question now before us discussed at the hearing. For the purpose of that appeal it was unnecessary to discuss or decide whether article 62 or article 120 applied. In either case the suit was barred by limitation as having been brought more than six years after time. The only point decided was that article 123 did not apply.

In the case of *Riasat Ali* v. *Hasin Banu* (3) the plaintiff sued to recover the estate of her deceased husband from the latter's brother Riyasat Ali who had taken possession of it. She based her

(1) (1896) I. L. R., 19 All., 169. (2) (1889) I. L. R., 12 Mad., 487.

(3) (1893) I. L. R., 21 Calc., 157.

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title on a special custom. The estate consisted of both movable and immovable properties. Their Lordships of the Privy Council held, in regard to the cash and movables wrongfully seized by the defendant, that neither article 123 nor article 49 applied, but that article 120 applied. In regard to article 49 their Lordships remarked :—"This latter article does not appear to be applicable to a suit to establish a right to inherit the property of a deceased person." It is obvious that the present suit is not one to establish a right of inheritance.

The plaintiff's right to a one-fourth share in the money in suit has not at any time been disputed. On the contrary, it has always been openly admitted by the defendants, who, in the execution proceedings, when they objected to the plaintiff being brought on the record as a decree-holder, stated that they would pay to the plaintiff her one-fourth share in the amount recovered from the judgement-debtor after deduction of costs.

When the amount of the decretal debt was set off in part against the amount of the defendants' bid at the auction, this was done as a matter of convenience, and it was as if the defendants Nos. 1 to 3 had paid in the amount of their bid and had then with defendants 4 to 6 recovered the amount due under the decree, and we have no hesitation, on the facts of the suit before us, in holding that article 62 applies. The money was received by the defendants for the plaintiff's use. The decision in *Mahomed Wahib* v. *Mahomed Ameer* (1) supports us.

It is urged that section 10 of the Limitation Act applies, and that there is really no period of limitation for such a suit as the present. It is clear, however, that section 10 only applies to express trusts and not to circumstances such as those of the present suit.

It is also pleaded that if the money claim be held barred by time, then the court ought to give the alternative relief, i.e. possession of a one-fourth share in the property. In the first place we must point out that, though the plaintiff has appealed, she has not appealed on this point at all. In the next place we fail to see that she is equitably entitled to a one-fourth share in the property. She was not a co-decree-holder, nor did the defendants Nos. 1 to 3 put the decree into execution to recover only a sum of money in

(1) (1905) I. L. R., 32 Calc., 527.

the whole of which the plaintiff had a one-fourth share. The money recoverable by the decree included the costs of the suit and execution proceedings. The property was purchased for a sum of money greater even than the full amount of the decree. Moreover, in equity the defendants were entitled to recoup to themselves the costs incurred in obtaining the succession certificate. Moreover, the amount due under the decree was set off only in part against the money due from the defendants, purchasers, under their bid at auction. The purchase was made on behalf of only three of the decree-holders and not on behalf of all.

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We, therefore, hold that the plaintiff has no cause of action to recover a one-fourth share in the property.

The plaintiff was entitled to recover a one-fourth share in the decretal debt after deduction of all expenditure incurred legitimately by the defendants in recovering the debt. She waited for six years and nine days after the date of the sale before she sued, though her right had been admitted, and has only herself to blame for the result of her own delay.

The suit is barred by limitation. We allow the appeal and dismiss the suit with costs in both courts.

Appeal allowed.

Before Mr. Justice Tudball and Mr. Justice Rafiq.

1915 *February*, 2.

HAR PRASAD (DEFENDANT) *v.* SUKHDEVI KUNWAR (PLAINTIFF)*.

Will—Construction—Bequest in favour of two brothers—Legatees to take in equal shares—Tenancy in common or joint tenancy.

A Hindu who had been adopted made a will authorizing his wife to make an adoption, and in case she failed to do so, leaving his property to his two own brothers "in equal shares." *Held* that the brothers took as tenants in common and not as joint tenants. *Gopi* v. *Jaldhara* (1) followed. *Mankamna Kunwar* v. *Balkishan Das* (2) distinguished. *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (3) referred to.

THE facts of this case were as follows:—

One Anand Behari Lal had three sons, Har Prasad, Ganga Prasad and Gur Prasad. Gur Prasad was adopted by a cousin of

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*First Appeal No. 242 of 1913 from a decree of Jotendra Mohan Bose, Additional Subordinate Judge of Mainpuri, dated the 17th of May, 1913.

(1) (1910) I. L. R., 33 All., 41. (2) (1905) I. L. R., 28 All., 38.

(3) (1896) I. L. R., 23 Calc., 670.

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Anand Behari Lal named Ram Charan Lal. Gur Prasad and Ram Charan Lal fell out and divided the family property. Gur Prasad died leaving a will in respect of the property which had come to him on the said partition. The testator gave his property to his wife for her life, and in case she made an adoption, the adopted son was to take an absolute estate. In case the wife did not adopt, the testator directed that after her death "my own brothers Babu Har Prasad and Babu Ganga Prasad will be the owners of the aforesaid property, together with all rights, in equal shares."

The widow died without making an adoption, and the two brothers Har Prasad and Ganga Prasad remained in possession for some time. Ganga Prasad died leaving a widow and daughters. The plaintiff who was the widow of Ganga Prasad brought this suit for possession of her husband's share in the property. The court below decreed the suit. The defendant appealed.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Munshi *Gulzari Lal*), for the appellant:—

Under the terms of the will Ganga Prasad and Har Prasad took the property as joint tenants. It was a devise to the two brothers who were members of a joint family, and was treated as such, and in the absence of evidence to the contrary it should be taken to be a devise of a joint tenancy. Under the English law such a bequest constitutes a joint tenancy. See the observations of STANLEY, C. J., in *Mankamna Kunwar* v. *Balkishan Das* (1). The mere use of the words "in equal shares" does not make a joint tenancy a tenancy in common. He referred to and discussed *Gopi* v. *Jaldhara* (2).

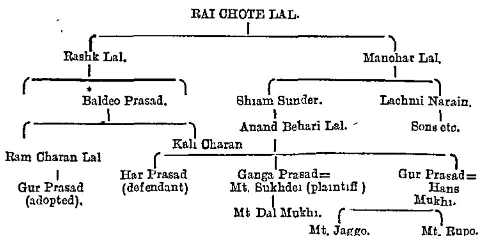
The case was then argued on the facts.

The Hon'ble Dr. *Sundar Lal*, Pandit *Lachman Rao Dube* and Babu *Girdhari Lal Agarwala*, for the respondent, were not heard in reply.

TUDBALL and RAFIQ, JJ.—This is a defendant's appeal arising out of a suit for possession brought by the widow of the defendant's deceased brother, Ganga Prasad, for recovery of her husband's separate estate *plus* mesne profits. The court below decreed the claim. The following genealogical tree will assist

(1) (1905) I. L. R., 28 All., 38. (2) (1910) I. L. R., 33 All., 41.

the understanding of the case. It is not a complete tree of the whole family of Rai Chote Lal, but is sufficient for the case.



Ram Charan Lal adopted Gur Prasad, the son of Anand Behari Lal. The parties are Kayasths by caste.

It is common ground that a dispute having arisen between Ram Charan and his adopted son, there was a partition and a half share of the former's property was handed over to Gur Prasad, and it is a half share in the estate thus acquired by Gur Prasad that is now in dispute.

Gur Prasad died on the 21st of May, 1906. On the 5th of May, 1903, he made a will. He gave a life interest in his estate to his wife with remainder over to his two natural brothers, Har Prasad and Ganga Prasad in equal shares, as stated in para. 5 of the will. The widow held the estate till her death, on the 28th of May, 1906, when the property went under the will to Har Prasad and Ganga Prasad. It will be noticed that Gur Prasad disinherited his own two daughters Jaggo and Rupo, though he gave them a maintenance allowances payable out of the income of the estate. On the 27th of March, 1911, Ganga Prasad died and Har Prasad is in possession of the whole estate. The former's widow is the plaintiff and her case is as follows :—

(1) That the two brothers were separate.

(2) That the two brothers each took a separate share in the estate of Gur Prasad under the will, and that Ganga Prasad's share therein was his self-acquired property and separately enjoyed by him.

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The defence of Har Prasad was—

(1) That the devise to the two brothers was made to them jointly so that on the death of one the other took the whole by survivorship.

(2) That even if this was not so the two brothers threw the estate into the joint family estate, and it was treated as joint family property and must now be held to be such, as the family has all along been joint.

(3) That in equity, if the plaintiff is legally entitled to the estate, she is bound to refund to him certain expenditure incurred by him.

The court below has held on a construction of the will—

(1) That each of the brothers took a half share in the estate of Gur Prasad and that they did not take jointly;

(2) That though there had not at any time been any partition or separation in the family of Anand Behari Lal and his sons, still the shares taken by the two sons had been held and enjoyed separately, and that the widow was entitled to her husband's separate acquisition;

(3) That the plaintiff was entitled to Rs. 1,128 as mesne profits up to the date of suit after allowing the defendant 10 per cent. for the costs of management, Rs. 1,200 allowances paid to Gur Prasad's daughters, Rs. 74, for survey expenses and Rs. 200, paid for owner's rate. The defendant appeals and three points are pressed before us:—

(1) That on a proper construction of the will the two brothers took the estate jointly and did not hold as tenants in common.

(2) That even if they got separate shares under the will still they treated it as joint family property and not as separate acquisitions; and it thus became joint family property.

(3) That the defendant is entitled to credit for certain items of expenditure disallowed by the court below.

To properly estimate the value of the evidence on the record it is necessary to set out the circumstances of this family.

[The judgement then set out those circumstances.]

There, therefore, had been no cause for separation or partition in the family of Anand Behari and his sons. There was no property to divide beyond the ancestral home, part only of which belonged to them. The father and elder son were each earning a

separate income. In a sense they formed a joint family, but without any joint family property of any import. 1915

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We now consider the terms of the will. It is to be found translated at page 21A. We have examined the original which is in Urdu.

The testator left his estate to his widow for her life-time in case the child which was about to be born to her should be a girl or being a boy should die at his birth. If the child should be a boy and he lived, the estate was to be his. He also by a separate deed granted her authority to adopt; and if she did adopt as directed, the adopted son was to take the estate. In the absence of a son, the widow was to hold the estate for life with certain limited powers of alienation. After the death, his daughters were not to inherit but were to receive Rs. 25 per mensem each from the estate as maintenance which they were empowered to enforce in a certain manner.

Then comes the fifth paragraph with which we are concerned.

"I direct that after the death of my wife and in the absence of a son begotten or adopted, my own brothers Babu Har Prasad and Babu Ganga Prasad shall be the owners of the aforesaid property, together with all rights, 'in equal shares.' I do not think it proper to commit to writing the reason for my taking this course as it would bring disgrace on the family, &c., &c."

The rest of the document does not affect the point now in dispute.

The appellant's case is that the devise contained in the will is to the two brothers jointly. He even produced oral evidence to prove that the testator had expressed *this* intention. One witness even went so far as to say that though the words *ba hissa masavi* (in equal shares) usually mean "in equal shares" still in the will they meant "jointly."

We are also asked to consider the decision in *Mankamna Kunwar* v. *Balkishan Das* (1), wherein it was observed that under the English law a conveyance of land to two or more persons without words indicating an intention that they were to take as tenants in common constitutes a joint tenancy.

The reply to this is a simple one. The will in the present case clearly uses language indicating that the two brothers were to take the estate as tenants in common, for they were to take in

(1) (1905) I. L. R., 2 All., 38.

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equal shares. Furthermore, we would call attention to the language used by their Lordships of the Privy Council in *Jageswar Narain Deo* v. *Ram Chandra Dutt* (1), which was quoted in the case of *Gopi* v. *Musammat Jaldhara* (2);—"In the first place, it appears to their Lordships that the learned Judges of the Madras High Court were not justified in importing into the construction of a Hindu will an extremely technical rule of English conveyancing. The principle of joint tenancy appears to be unknown to Hindu Law except in the case of co-parcenary between the members of an undivided family."

It is urged that the testator was on bad terms with his adoptive father and had great natural affection for his own father and brothers who formed a joint family, and that while he was disinheriting his own daughters, would not have wished to let the property go to the daughters of his brothers who at that time had no male issue. There is no force in any of these pleas. The brothers were not old men, but young, and there was every probability of their having male issue, and there is the plain simple language of the will which directed that the two brothers were to take in equal shares. We have no hesitation in holding that the will in clear terms created a tenancy in common; moreover, we agree with the lower court in holding on the second plea that the two brothers treated the tenancy as one in common and did not treat it as joint family property which is the second plea raised before us and which we now proceed to discuss.

[The oral and documentary evidence was then discussed.]

Where the two brothers inherited the property in equal shares, the burden of proof that after the inheritance they threw the property into the family hotch potch, is upon those who assert it. There is no presumption that this was so. The evidence produced by the defendant is not in our opinion worthy of belief and we therefore agree with the court below and hold that the defendant has failed to prove his case.

There remains one point for decision. The appellant claims credit for certain items of expenditure alleged to have been incurred by him. Five such are placed before us for our decision.

(1) (1886) I. L. R., 23 Calc., 670. (2) (1910) I. L. R., 33 All., 41.

[The judgement then dealt with these items].

We decline to award any of these items. The result therefore is that the appeal fails and is dismissed with costs.

Appeal dismissed.

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APPELLATE CRIMINAL.

Before Mr Justice Chamier and Mr. Justice Piggott

EMPEROR v. DIP NARAIN.*

1915 January, 26.

Act No I of 1872 (Indian Evidence Act), section 30—Evidence—Confession—Admissibility of, in evidence against co-accused.

One out of several accused persons who were being tried jointly for an offence under section 193 of the Indian Penal Code pleaded guilty and made a statement implicating himself and other accused. The Magistrate, however, did not convict him merely upon his plea of guilty, but upon the evidence and upon the statement made by him The Magistrate also took the confession of this accused into consideration as against the others.

Held that the course taken by the Magistrate was not only admissible, but that in the circumstances of the case the Magistrate would not have exercised a sound discretion in convicting the confessing accused at once on the strength of his own statement alone.

THE facts of the case were, briefly stated, as follows :—

Nine persons were put on their trial before a Magistrate of the first class on charges under sections 211 and 193 of the Indian Penal Code, or of abetment of the offences named therein. After the evidence for the prosecution had been recorded the accused were called upon to enter on their defence, when one of them, Muhammad Ishaq, made a statement amounting to a confession implicating himself and his co-accused and pleaded guilty. The Magistrate, however, did not convict Muhammad Ishaq on this plea. He proceeded with the case against all the accused and ultimately convicted them all. He took the confession into consideration against the other accused. Muhammad Ishaq was not convicted on his plea of guilty. All the accused appealed. The Sessions Judge held that the confession could not be taken into consideration against the other accused. He remarked :—" The trial was no doubt joint up to a certain stage. But as soon as he pleaded guilty the Magistrate should

* Criminal Appeal No. 995 of 1914 by the Local Government from an order of Durga Dat Joshi, Sessions Judge of Azimgarh, dated the 7th of September, 1914.

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have convicted him. There was no necessity to keep him on in the dock. The Magistrate, it appears from his judgement, was clearly of opinion that the statement of Ishaq was true . . . There is a ruling of the Madras High Court in I. L. R., 22 Mad., 491, where in a case tried before a Magistrate the statement made by one accused was not considered as evidence against the other . . . See also I. L. R., 17 All., 524; I. L. R., 23 All., 53; and I. L. R., 30 All., 540. As there was no joint trial of Ishaq with the appellants his statement is not admissible in evidence." In the end the Sessions Judge set aside the convictions of two persons and acquitted them and dismissed the appeals of the rest. The Local Government appealed against the acquittal of one, namely, Dip Narain.

The Government Advocate (Mr. *A. E. Ryves*), for the Crown:—

The case was decided upon the whole of the evidence, including the confession of Muhammad Ishaq. He was not convicted on his plea of guilty; so it cannot be said that his conviction was deferred merely with the object of taking his statement into consideration against his co-accused. The cases referred to by the Sessions judge are, therefore, distinguishable. There is also another ground of differentiation. In a sessions trial the plea of the accused is recorded at the outset of the trial. The present case being a warrant case triable by a Magistrate the whole of the prosecution evidence had to be recorded first and then the plea of the accused was taken. The Madras case relied on by the Sessions Judge was a summons case; and the other cases were sessions cases. I rely on the following rulings:—*In re Vempalli Bali Reddy* (1) and *Queen-Empress* v. *Chinna Pavuchi* (2). The statement of Muhammad Ishaq can, therefore, be taken into consideration against his co-accused.

Mr. *C. C. Dillon* (with him Babu *Satya Chandra Mukerji*, Dr. *Surendra Nath Sen*, Pandit *Ramakant Malaviya* and Maulvi *Iqbal Ahmad*), for the accused, discussed the facts and evidence and supported the judgement of the Sessions Judge.

CHAMIER and PIGGOTT, JJ.—This is an appeal by the Local Government against the acquittal of one Dip Narain,

(1) (1913) 22 Indian Cases, 157. (2) (1899) I. L. R., 23 Mad., 151.

who was convicted by a Magistrate of the first class of an offence punishable under sections 211/109 of the Indian Penal Code, but acquitted by the learned Sessions Judge of Azamgarh on appeal. As a matter of fact nine persons were put on their trial before the Magistrate, all of whom were convicted and all of whom appealed. The Sessions Judge dismissed seven of the appeals, but acquitted Dip Narain and one Musammat Talia. There has been no appeal against the acquittal of the latter.

The task before us is a simpler one than was before the courts below, as many matters which were in controversy there have been accepted in argument in this Court as fully established by the evidence. We find that Gaya, *Sunar*, resident of Shahzadpur in the Fyzabad district, was on bad terms with his relatives, Sarju and Lachhman. He somehow or other came to believe that a false charge brought against these persons could be successfully prosecuted, if suitable measures were taken, before a certain Bench of Honorary Magistrates exercising jurisdiction at Azamgarh. He came in to Azamgarh for that purpose, and there got into communication with various persons, including Gulab, *Sunar*, and one Muhammad Ishaq, a dealer in timber. A conspiracy was hatched for the filing of a false complaint before a Bench of Honorary Magistrates consisting of Raja Muhammad Shah and Babu Krishan Deo Narain Singh. Salaran, *Teli*, of Azamgarh was employed to come forward as complainant; and it seems to us perfectly clear on the evidence—if indeed this much also has not been practically conceded in argument before us—that there were members of the conspiracy who professed to be able to ensure its success by bringing improper influence to bear on Babu Krishan Deo Narain Singh. Accordingly, on the 3rd of April, 1914, Salaran filed a complaint before the Honorary Magistrates already named, in which he falsely charged Sarju and Lachhman with having committed, within the jurisdiction of the said Magistrates, offences punishable under sections 323, 406 and 417 of the Indian Penal Code. Salaran was examined on his complaint and put in a list of witnesses. We cannot refrain from remarking that a magistrate of experience could scarcely have helped seeing that the story told by Salaran was a most extraordinary one, and that even if it might prove on inquiry that there was some truth in the other allegations made

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by him, the story of the assault said to have been committed by Sarju and Lachhman on the 1st of April bore every appearance of being a piece of imaginative embroidery. The Honorary Magistrates, however, took cognizance of the complaint as one of causing hurt (under section 323, Indian Penal Code) only, and issued process for the attendance of the accused persons and of the witnesses named by Salaran, fixing the 17th of April, 1914, for the trial. On that date Sarju and Lachhman, having come to Azamgarh and secured the services of Sheikh Faiyaz Husain, a local mukhtar, presented a petition before the Sub-divisional Magistrate asking for a transfer of the case against them to some other court. There were allegations made in this petition which satisfied the Sub-divisional Magistrate that prompt action was called for on his part. He transferred the complaint of Salaran to his own file, and went over in person to the court of the Honorary Magistrates to take possession of the record and secure the attendance before himself of the complainant and his witnesses. The falsity of the complaint was at once disclosed. Salaran absconded. His witnesses denied all knowledge of the affair. The complaint was dismissed, and the Sub-divisional Magistrate initiated a proceeding under section 476 of the Code of Criminal Procedure, which resulted in the trial out of which the present appeal has arisen.

As against Dip Narain the case for the prosecution is that he was an active member of the conspiracy which organized the institution by Salaran of his false complaint of the 3rd of April, 1914, and more particularly that he was the member to whom the others looked as the instrument through which improper influence was to be brought to bear on the Honorary Magistrate, Babu Krishan Deo Narain Singh.

In this connection we may at once proceed to comment on one aspect of the case which calls for special notice. The learned Sessions Judge seems to have been much influenced by the view that the case for the prosecution involved serious allegations against this Honorary Magistrate. He considered those allegations grossly improbable and very inadequately supported by the evidence. He then followed out a train of reasoning according to which the acquittal of Dip Narain appears to follow as a necessary consequence on the failing of the prosecution to establish any specific

charge of corruption or misconduct against Babu Krishan Deo Narain Singh. We are quite unable to look at the case in this light. The Honorary Magistrate was not on his trial. No charge was preferred against him, and no onus lay on the prosecution of establishing any such charge. The question with which we are concerned, is whether Dip Narain represented himself, or was understood by the other conspirators, to be a person in a position to bring corrupt influences to bear on the Honorary Magistrate. Whatever remarks we may find it necessary to make on any portions of the evidence, we have to bear in mind that the point for determination is the guilt or innocence of Dip Narain, and that his guilt is perfectly consistent with the entire innocence of the Honorary Magistrate.

[The judgement then proceeds to discuss the facts and evidence].

This is the position we have reached without even touching upon the two most controverted points in the case, the evidence of the witness Chedi Rangrez and the confession of the accused Muhammad Ishaq. If we could be sure that these two men spoke the truth to the best of their knowledge, we need not have discussed any other evidence. Both assert that the filing of Salaran's complaint was the outcome of an elaborate conspiracy, in connection with which Dip Narain was an important member, acting (or purporting to act) as go-between for the others in their dealings with Babu Krishan Deo Narain Singh The confession of Muhammad Ishaq obviously requires to be taken into consideration against all the accused; the learned Sessions Judge need have had no misgivings on this point. Muhammad Ishaq was not convicted on his plea of guilty, and he was tried jointly with the other accused. Under the circumstances of this case the trying Magistrate would have shown very poor discretion if he had convicted Muhammad Ishaq on his plea of guilty, thereby recording his belief in the substantial truth of Muhammad Ishaq's confession before the other accused had even entered on their defence. The case obviously required the most thorough sifting out, before any court could say with confidence that Muhammad Ishaq's confession was substantially true, even where it implicated himself. As it is, the learned Sessions judge has taken into consideration the confession of

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Muhammad Ishaq to a far greater extent than did the trying Magistrate; only he has used it to discredit the witness Chedi and to throw doubt on the prosecution case generally, as if the prosecution could be made responsible for all the allegations which Muhammad Ishaq saw fit to make against the Honorary Magistrate.

[The judgement again proceeded to discuss the facts and evidence.]

We set aside the Session Judge's order of acquittal, and we restore the Magistrate's convicting Dip Narain on the charge under sections 211/109 of the Indian Penal Code as framed. No special argument has been addressed to us on the subject of sentence, and we see no adequate reason for departing from the sentence originally passed by the trying Magistrate. We sentence Dip Narain to be rigorously imprisoned for one year and to pay a fine of Rs. 60. In default of payment of fine he will undergo further rigorous imprisonment for two months. He must surrender to his bail accordingly. Any period of imprisonment which he may have already undergone will count towards execution of the sentence now imposed.

APPELLATE CIVIL.

Before Mr. Justice Chamier and Mr. Justice Piggott.

1915
February, 5.

KHUSHHALI RAM (APPLICANT) *v.* BHOLAR MAL AND OTHERS (OPPOSITE PARTIES)*

Act No. III of 1907 (Provincial Insolvency Act), section 36—Insolvency—Right of one creditor to challenge claim of another—Duty of Court to inquire—Jurisdiction.

Held that it is open to any creditor of an insolvent to challenge the validity of a debt set up by another creditor and, if he does so, the Judge is bound to inquire into the truth of his allegations in the insolvency, and cannot merely refer the applicant to his remedy by suit.

THE facts of this case were as follows:—

One Mutasaddi Lal applied on the 10th of March, 1914, to be adjudicated an insolvent. His application was opposed by one of his creditors named Khushhali Ram, on various grounds, but he was so adjudicated by an order of the same date. On the 6th of April, 1914, Khushhali Ram presented to the court an application,

* First Appeal No. 113 of 1914, from an order of G. K. Darling, Additional Judge of Meerut, dated the 6th of April, 1914.

the substance of which was that a mortgage-deed executed by the insolvent on the 26th of November, 1913, in favour of one Bholar Mal, for a sum of Rs. 1,500 was a fictitious transaction entered into merely to defeat the creditors of the executant. The Judge, considering that he had no jurisdiction to inquire into the allegation contained in Khushhali Ram's petition as part of the insolvency proceedings before him, directed the applicant to seek his remedy by a separate suit and rejected the application. The applicant appealed to the High Court.

Babu *Sital Prasad Ghosh*, for the applicant.

Dr. *Surendro Nath Sen*, for the opposite parties.

CHAMIER and PIGGOTT, JJ.—This is an appeal from an order passed by the Additional Judge of Meerut in an insolvency proceeding. One Mutasaddi Lal applied to be ajudicated an insolvent, on the 10th of March, 1914. His application was opposed by one of his creditors, named Khushhali Ram, on various grounds, but he was so adjudicated by an order of the same date. On the 6th of April, 1914, Khushhali Ram, who was a creditor shown on the insolvent's schedule, presented an application to the court, the rejection of which has led to the present appeal. The application was badly drafted. It referred to no definite section of the Provincial Insolvency Act and alluded in a confused manner to two separate transactions, with one of which we are not now concerned. In substance, however, the application was one which deserved more consideration at the hands of the Additional Judge than it has received. The allegation was that a mortgage-deed executed by the insolvent on the 26th of November, 1913, in favour of one Bholar Mal, for a sum of Rs. 1,500, was a fictitious transaction, entered into merely to prejudice the creditors of the executant. Whether the application is to be regarded as one asking for the removal of the name of Bholar Mal from the schedule of creditors, or as one falling under the provisions of section 36 of the Provincial Insolvency Act (III of 1907), the matter was one which required investigation. The learned Additional Judge seems to have thought that it was quite sufficient for him to note that he had before him a registered document admittedly executed by the insolvent. He held that no further inquiry was required, or could properly be conducted, in the insolvency

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proceedings, and that Khushhali Ram's remedy, if any, was by way of a separate suit. In our opinion the learned Judge misconceived the extent of his jurisdiction in insolvency proceedings. He was bound to inquire into this question of the alleged mortgage, at the instance of any creditor who claimed to be prejudiced thereby. He might have come to the conclusion that there had been a transfer by way of mortgage under circumstances calling for interference on his part under section 36 of the Insolvency Act, or he might have found that there had been a purely fictitious transaction, not involving any transfer; in either case the name of Bholar Mal would require to be removed from the list of creditors and the property purporting to be affected by this mortgage would become available for the benefit of all the creditors, free of incumbrance. We think that Khushhali Ram's application should have been taken up, notice of the same given to the insolvent and to Bholar Mal, and the question raised inquired into and decided. We set aside, accordingly, the order complained of and remand the case to the court below with directions to inquire into the matter as stated above. The costs of this appeal will abide the result of this further inquiry hereby directed.

Appeal allowed.

Before Mr. Justice Chamier and Mr. Justice Piggott.

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February, 8.

SHER KHAN AND OTHERS (DEFENDANTS) v. DEBI PRASAD (PLAINTIFF)*

Act (Local) No. II of 1901 (Agra Tenancy Act), section 167—Jurisdiction—Civil and Revenue Courts—"Matter in respect of which a suit might be brought" in the Revenue Courts.

The owners of certain zamindari property first mortgaged the property and then executed a perpetual lease of some land appertaining thereto. The mortgagees brought the zamindari to sale, and it was purchased by a stranger. The auction purchaser then sued the lessees in the civil court for recovery of possession of the land held by them. The lessees were directed to institute a suit in the revenue court to determine the question whether they were or were not tenants of the plaintiff. In this suit the auction purchaser admitted the existence of a tenancy, but pleaded that the precise nature of the tenancy, and in particular the validity of the perpetual lease, was not a matter for determination *in that suit*. A decree was passed by the revenue court to the effect that the lessees were tenants of the plaintiff auction purchaser.

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* First Appeal No. 102 of 1914, from an order of H. E. Holmes, District Judge of Aligarh, dated the 4th of May, 1914.

Subsequently the plaintiff amended his plaint by asking for a simple declaration that the perpetual lease was not binding on him.

Held that the suit so framed was barred by section 167 of the Agra Tenancy Act, 1901. The plaintiff might have instituted a suit for ejectment in the revenue court, in the course of which the validity of the perpetual lease would have to be determined. *Ram Singh* v. *Girraj Singh* (1) followed.

THE facts of this case were as follows:—

On the 12th of January, 1897, Musammat Lachman Kunwar executed a mortgage of a 4 biswa share in favour of Chattar Singh. On the 6th of April, 1898, she executed a perpetual lease of 31 bighas odd out of the mortgaged property in favour of Nawab Khan. Chattar Singh sued on his mortgage. He impleaded Nawab Khan as a defendant and impeached the perpetual lease. No relief by way of cancellation thereof was, however, prayed for, and there was no issue or finding on that point. A decree for sale was passed, and the property was sold and purchased by the plaintiff, who obtained delivery of possession in July, 1909. It appeared that after this he accepted rent from the heirs of Nawab Khan, who had died meanwhile. On the 27th of September, 1910, the plaintiff sued the heirs of Nawab Khan in the Civil Court for possession of the 31 bighas odd and for a declaration that the perpetual lease was void and not binding on him. The defendants pleaded that the relation of landlord and tenant subsisted between the parties and that the suit was not cognizable by the Civil Court. They were directed to institute a suit in the Rent Court to establish their tenancy. They did so, and in that suit the plaintiff admitted that the defendants were his tenants, although he questioned the validity of the perpetual lease. On the 15th of June, 1912, the Rent Court declared the defendants to be tenants of the plaintiff; the question of the validity or otherwise of the perpetual lease was not decided, the plaintiff having pleaded that it was not a matter for determination in that suit. The plaintiff then amended his plaint of the 27th of September, 1910, by abandoning the claim for possession. The court of first instance was of opinion that the question between the parties was virtually one relating to the class of the defendant's tenancy and triable by the Rent Court alone. It dismissed the suit. On appeal the

(1) (1914) I. L. R., 37 All., 41.

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District Judge held that the suit was not barred by section 167 of the Tenancy Act, and remanded the case for trial on the merits. The defendants appealed to the High Court.

The Hon'ble Mr. *Abdul Raoof* (with him Maulvi *Shafi-uz-zaman*), for the appellants :—

The real object of the suit is the determination of the character of the defendants' tenancy ; whether they are tenants at will or tenants holding under a perpetual lease. A suit for a declaration that the perpetual lease is not binding on the plaintiff is in substance a suit for a declaration that the defendants are tenants at will. The suit falls within section 95 of the Tenancy Act ; if not within clause (*b*) then within clause (*a*) of that section. The words "description of the tenant" in clause (*a*) cover a statement whether the tenant is a tenant at will or a perpetual lease-holder. Hence section 167 of the Tenancy Act bars the cognizance of the suit by the Civil Court. If it be held that the suit as framed does not fall within section 95 of the Tenancy Act, still the suit is barred by section 167. The plaintiff's natural and proper remedy against the perpetual lease was to sue in the Revenue Court for ejectment of the defendants, treating them as tenants at will and ignoring the lease. If the defendants then set up the lease the Revenue Court would be competent to determine and would determine whether it was valid and binding or not. As the plaintiff could have adopted that course, section 167 bars the jurisdiction of the Civil Court to determine the same question. The mere alteration in the form of the suit by asking for a declaration that the lease is not binding cannot oust the exclusive jurisdiction of the Revenue Court ; the ultimate object of this declaration is ejectment of the defendants by the Revenue Court. I rely on the cases of *Rai Krishna Chand* v. *Mahadeo Singh* (1) and *Ram Singh* v. *Girraj Singh* (2). What section 167 provides is that where the dispute or matter about which the plaintiff seeks relief is such that in respect thereof he can bring a suit or make an application of the nature specified in the fourth schedule of the Tenancy Act, then he must do so; he cannot take the matter to any other court under some other guise. In this case the plaintiff could

(1) Weekby Notes, 1901, p. 49. (2) (1914) I. L. R., 37 All., 41.

bring a suit for ejectment under section 58 which is a suit specified in the fourth schedule. Unless this interpretation is put upon section 167, the latter part of it would be pointless and unnecessary. That a comprehensive scope was intended to be given to the latter portion of the section is clear; for it excludes from the jurisdiction of the Civil Court not alone "such suits and applications" as are specified in the fourth schedule, but "any dispute or matter in respect of which any such suit or application might be brought or made."

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Babu *Purushottam Das Tandan*), for the respondent:—

The suit as framed is expressly for a declaration that a certain lease is bad. It is *primâ facie* cognizable by a Civil Court unless the cognizance thereof is barred by any enactment. It is said that section 167 read with section 95 of the Tenancy Act, operates as a bar. Section 95 has no application; the declaration claimed does not come under either clause *(a)* or clause *(b)* of that section. The nature and character of a tenancy comes within the word "class" of clause *(b)*. It cannot be said that the word "description" in clause *(a)* means the same thing; there must be a sharp distinction between the two clauses. Now, whether the lease is good or bad, the defendants cannot come under any "class" of tenancy as defined in section 6 of the Tenancy Act other than the fifth, namely, non-occupancy tenant. There is thus no dispute as to the class of tenancy and the suit does not fall within section 95. A suit for a declaration that a lease is inoperative is not of the nature specified in the fourth schedule of the Tenancy Act. In fact, such a suit is not expressly provided for by the Rent Act at all. Section 167 does not, therefore, apply. In considering the applicability of section 167, one must begin by finding out whether the suit or application is provided for in the fourth schedule; if it is not, then the latter portion of the section does not come into play at all. The word "such" shows this. The section is to be interpreted in this way, that the first part says that certain specified suits and applications are cognizable by the Revenue Courts but does not prohibit the jurisdiction of the Civil Court; then comes the second part which says that in "such",

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cases the jurisdiction of the Civil Courts is excluded. According to this interpretation the second part would not be unnecessary or meaningless; but for it the jurisdiction of the Civil Courts would not be ousted. The interpretation sought to be put upon it by the appellants would be too wide. But, even accepting that interpretation, the question would arise whether the Revenue Court was competent, in a suit for ejectment, to decide whether the perpetual lease was valid or not. The Revenue Court has no authority to determine such a question; and if it took upon itself to do so the decision would not be final or *res judicata*. I rely on the case of *Gomti Kunwar* v. *Gudri* (1). The ruling in 22 A. W. N., relied on by the appellants was considered in that case. Section 167 is directed only to those matters which can be finally and effectively decided by the Revenue Courts so as to constitute *res judicata*. The case cited by the appellants—*Ram Singh* v. *Girraj Singh* (2)—is distinguishable. There the lease had been directly set up in the Revenue Court and that court had decided that it was valid. When the plaintiff went to the Civil Court the Judges said that the effect of the civil suit would be to nullify the decision of the Revenue Court. In the present case the Revenue Court did not decide the question of the validity of the lease at all. It expressly left the question open. Moreover, in that case the suit was in substance one for ejectment; here, as the case now stands, the suit is for a declaration alone. If a plaintiff wants a declaration from a Civil Court he cannot be compelled to go to another court and seek ejectment. There may be cases in which the plaintiff has no right to present possession by ejectment; for example, where the question is whether the defendant holds as lessee for ten years or as a permanent lessee.

The Revenue Courts could not have entertained a suit in which the relief now claimed was incorporated in the plaint.

The Hon'ble Mr. *Abdul Raoof* was not heard in reply.

PIGGOTT, J.—This is an appeal by the defendants against an order of the learned District Judge of Aligarh passed under order XLI, rule 23, remanding to the court of the Subordinate Judge of Aligarh, for decision on the merits, a suit which had been dismissed by that court. The learned Subordinate Judge had

(1) (1902) I. L. R., 25 All., 138. (2) (1914) I. L. R., 37 All., 41.

held that, on the facts stated in the plaint, the suit was not cognizable by him, being barred by section 167 of the Agra Tenancy Act (Local Act II of 1901). This is the finding which the learned District Judge has reversed on appeal and his decision is now challenged before us. There was a mortgage of some zamindari property on which a suit was brought and a decree for sale was made. After the mortgage, but before the decree for sale, the mortgagors executed a perpetual lease in respect of certain lands appertaining to the share in question. In execution of the decree for sale the zamindari property was put to sale and was purchased by the present plaintiff. He brought this suit in order to get rid of the perpetual lease. As originally drafted, the relief claimed in the plaint was recovery of possession over the land in question as against the defendants lessees. In reply the defendants lessees claimed the benefit of section 202 of the Tenancy Act, and were accordingly directed to institute a suit in the Revenue Court for the determination of the question whether or not they held the land in suit as tenants of the plaintiff. They instituted a suit accordingly; but when that suit came up for trial the present plaintiff, who was defendant in the Revenue Court, admitted the existence of a tenancy. He pleaded that the precise nature of that tenancy, and in particular the validity of the perpetual lease under which the present defendants claimed to hold, was not a matter for determination in that suit. On this understanding a decree was passed to the effect that the plaintiffs in the Revenue Court, who are appellants before this Court, held the land in suit as tenants of the present plaintiff respondent. After the proceedings in the Revenue Court had thus terminated, the respondent obtained leave to amend his plaint by asking for a simple declaration that the perpetual lease in question was not binding upon him. It was the plaint as thus amended which the learned Subordinate Judge has held not to be cognizable by the Civil Court. The provisions of section 167 of the Agra Tenancy Act have been discussed in a number of rulings, the most recent of which is *Ram Singh* v. *Girraj Singh* (1). As will be apparent from that report, I am myself deeply committed to the

(1) (1914) I. L. R, 37 All, 41.

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view that the provisions of section 167 of the Tenancy Act do bar a suit like the present. The plaintiff in this case, having obtained possession of the zamindari share on his auction purchase, found in existence a perpetual lease of a portion of the property which he regarded as interfering with his full enjoyment of the property acquired by him. His natural remedy, if as a matter of fact the lease was executed under such circumstances as not to be binding upon him, was by way of a suit for ejectment under section 58 of the Tenancy Act. Such a suit would fall within the provisions of serial number 29 of group *(c)* of the fourth schedule to the Act in question and would be cognizable only by the Revenue Courts. The plaintiff in such a case would seek for ejectment of the defendants lessees on the ground that they hold only as tenants from year to year. In reply the perpetual lease in favour of the said defendants would be set up, and in order to the determination of the question thus raised the Revenue Court would have to decide whether the said lease was valid and binding on the plaintiff. The question is whether the plaintiff can be allowed to oust the jurisdiction of the Revenue Court, and bring his suit before a different forum, by seeking for a mere declaration. In the judgement which was before the Bench of this Court which decided the case of *Ram Singh* v. *Girraj Singh* (1) I have discussed this question at some length, and so far as I am concerned I have nothing to add to the reasons which I gave in my judgement in that case for holding that the second part of section 167 of the Tenancy Act must be construed as barring a suit like the present. It may be said that the final decision of the Bench of this Court does not proceed precisely on the lines taken by me. Even, however, confining my decision to the grounds taken by the learned Judges who decided the case of *Ram Singh* v. *Girraj Singh* (1) on appeal under section 10 of the Letters Patent, I would say that, if we disregard the form of the present suit, the real substance is clearly one which could have been decided in the Revenue Court. The object of the plaintiff is to get rid of the defendants who claim to hold the land in suit under a perpetual lease. This he can undoubtedly do by a suit in ejectment in the Revenue Court of the

(1) (1914) I. L. R., 37 All., 41.

nature already explained. I do not think he is entitled to come to the Civil Court for a mere declaration, the only object of which would be to enable him to take further proceedings in ejectment before the Revenue Courts. It seems to me that, unless this view is maintained, a conflict of jurisdiction between the Civil and Revenue Courts in matters of this sort will sooner or later be inevitable. Section 11 of the Code of Civil Procedure could not be applied, strictly on its terms, so as to make the decision of a Civil Court in a declaratory suit binding on the Revenue Court in a suit for ejectment, for it could be pleaded that the Civil Court had no jurisdiction to try the suit for ejectment. I would accordingly set aside the order of the lower appellate Court and restore that of the Court of first instance.

CHAMIER, J.—The facts of this case have been stated by my learned colleague and I will not repeat them. In the courts below it was contended on behalf of the defendants that the jurisdiction of the Civil Court was barred by the provisions of section 167 read with section 95 of the Agra Tenancy Act. The Subordinate Judge accepted this contention and dismissed the suit. On appeal the District Judge held that section 95 of the Act did not apply to the case at all because the plaintiff could not have brought a suit under section 95 for a declaration as to the validity of the perpetual lease set up by the defendants or to have it declared that the defendants were not the holders of a perpetual lease. Having regard to the definition of the word *class* contained in the Act it appears to me that a suit for such a declaration would not be a suit for a declaration as to the class to which a tenant belongs, nor do I think that such a suit would be for a declaration as to the name and description of a tenant within the meaning of clause *(a)* of section 95, though it was vigorously contended by Mr. *Abdul Raoof* that the word "description" covered such a case. In this Court it is contended that even if section 95 does not apply to the case, yet the jurisdiction of the Civil Court to entertain this suit is barred because at the date of the suit the plaintiff might have brought a suit for the ejectment of the defendants under sections 58 and 63 of the Tenancy Act. It has been held, I think rightly, in

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several cases by this Court that in a suit for the ejectment of a tenant if the tenant pleads that he holds under a perpetual lease under which he is not liable to be ejected it is for the Revenue Court to decide whether the plea is correct or not, but at least three Judges of the Court are further committed to the view that a suit like the one now before us cannot be maintained because the plaintiff might have instituted a suit in the Revenue Court for the ejectment of the defendants in which the validity of the lease set up by the defendants might have been determined. The case is really covered by the principle of the decision of RICHARDS, C. J. and BANERJI J. in *Ram Singh* v. *Gurraj Singh* (1), in which they approved of the view taken by my learned colleague. On the authorities I feel bound to hold that the question whether the defendants are entitled to hold the land under the perpetual lease set up by them is a "matter in respect of which" a suit might have been brought in the Revenue Court within the meaning of section 167 of the Tenancy Act, although the plaintiff could not in the Revenue Court have claimed any declaration regarding the lease. It may be doubted whether the authors of the section intended that it should be construed in such a comprehensive manner, but a *cursus curiae* has been established from which I am not prepared to dissent. I agree that this appeal should be allowed and the decision of the first Court restored.

BY THE COURT.—The appeal is allowed. The decree of the lower appellate Court is set aside and the decree of the first Court is restored with costs here and in the lower appellate Court.

Appeal allowed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr Justice Tudball.

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February, 9.

INDRAJ (PLAINTIFF) v. BROTHER CLEMENT, MISSIONARY (DEFENDANT) *

Per-emption—Custom—Vendor bound to offer to co-sharers—Refusal to purchase—Refusal to give more than a fixed price.

The custom in pursuance of which a right of pre-emption was claimed being that the vendor was bound to offer the property for sale to his co-sharers and only in case of their refusal he could sell to a stranger, the vendor offered the

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* Second Appeal No. 53 of 1915, from a decree of L. Johnston, District Judge of Meerut, dated the 22nd of September, 1914, confirming a decree of Additional Munsif of Ghaziabad, dated the 8th of July, 1914.

(1) (1914) I. L. R., 37 All., 41.

property in dispute to the pre-emptor, who offered only Rs. 160 for it *and refused to give more.* The vendor thereupon sold it for Rs. 235 to the defendant.

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Held that the conduct of the plaintiff amounted to a refusal to purchase the property and the vendor was not obliged to give him the option of taking up the contract which he subsequently made for Rs 235 *Kanhai Lal* v. *Kalka Prasad* (1) distinguished.

THIS was a suit for pre-emption claimed in accordance with the custom of the village, which was alleged to be that a co-sharer wishing to sell must first offer the property to his co-sharers. The vendor in this case offered the property to the pre-emptor, who offered Rs. 160 for it and refused to give more. The vendor then sold the property to a stranger for Rs. 235. The lower appellate Court held that this amounted to a refusal to purchase on the part of the pre-emptor and dismissed the suit. The plaintiff appealed to the High Court.

The appeal was heard under order XLI, rule 11, of the Code of Civil Procedure.

Dr. *Surendra Nath Sen,* for the appellant.

RICHARDS, C. J., and TUDBALL, J.—This appeal arises out of a suit for pre-emption. The alleged custom is that the co-sharer wishing to sell must first offer the property to his co-sharers. In the present case the court below has found that the vendor, wishing to sell first offered the property to the plaintiff and that the plaintiff offered only Rs. 160 and "*refused to give more.*" The vendor then went to the vendee and sold the property for Rs. 235. The court below has found under these circumstances that the plaintiff refused to purchase the property, and on that ground dismissed the suit. If this finding is justified it concludes the appeal. It seems to us that the court below was not only justified but was perfectly right in holding that the conduct of the plaintiff amounted to a refusal to purchase the property when it was offered to him. The vendor was entitled to assume that the plaintiff would not give Rs. 235 when he had refused to give more than Rs. 160.

Reliance is placed upon the case of *Kanhai Lal* v. *Kalka Prasad* (1). In that case, no doubt, the Court held that the vendor was bound, when he had concluded a definite arrangement with a stranger to offer the property to the person entitled to pre-empt,

(1) (1905). I L. R., 27 All., 670.

Held that the two documents were part of the same transaction and amounted to a settlement within the meaning of section 4 of the Stamp Act, and the stamp duty paid was sufficient.

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STAMP REFERENCE BY THE BOARD OF REVENUE.

THIS was a reference by the Board of Revenue under section 57 *(b)* of the Indian Stamp Act, 1899. The facts out of which the reference arose are fully set forth in the order of the Court.

Mr. *A. E. Ryves*, for the Crown.

KNOX, RAFIQ and PIGGOTT, JJ.—On the 15th of May, 1914, two brothers, Tribhuwan Dat Sukul and Maharaj Sumeshwar Dat Sukul, executed each of them a document. The deed of gift executed by Tribhuwan Dat Sukul has been endorsed by us as exhibit A, and the deed executed by Maharaj Sumeshwar Dat Sukul has been marked as exhibit B, and they will be alluded to in the course of this judgement in these terms.

Deed A is said to bear a stamp of Rs. 1,125. Deed B bears a stamp of Rs. 10. When the two documents were taken to the registration office, deed B was impounded, and on its coming before the Deputy Commissioner, Sitapur, that officer came to the conclusion that the stamp required was a stamp of Rs. 360. He also considered that penalty of Rs. 700 should be paid by Maharaj Sumeshwar Dat. Sumeshwar Dat appealed from the decision of the Deputy Commissioner to the Board of Revenue.

The Board of Revenue were unable to come to any conclusion as to what was the right and proper stamp to impose, and referred the matter to this Court under section 57 of the Indian Stamp Act.

We have had both deeds read to us, and we have had the assistance of the learned Government Advocate in considering the matter. Deed B is very inartistically drawn up. The language in which it is expressed is of such a dubious kind that it has not been easy to come to a decision on the question referred.

Briefly stated the case is as follows :—Tribhuwan Dat Sukul in consideration of love and affection and the promise to be maintained by his brother, executed a deed of gift of his immovable and movable property. It is this deed which has been stamped with a stamp of Rs. 1,125. Maharaj Sumeshwar Dat Sukul, as said above, on the same date executed deed B. In that deed he promises that during the life-time of Pandit Tribhuwan Dat he will pay whatever expenses may be required on account of food, conveyance, travelling for pilgrimage, charity, clothing &c.,

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STAMP REFERENCE BY THE BOARD OF REVENUE.

provided that Tribhuwan Dat live permanently in the ancestral house or in the house in which he may with his consent put him up and have no concern with the quarrelsome persons who created disunion between Pandit Tribhuwan Dat and himself.

There is a further clause which lays down the maximum amount per mensem which Tribhuwan Dat may expend for charity and railway journeys, &c. Up to this maximum Maharaj Sumeshwar Dat Sukul agrees to pay. There is also a clause regarding money "required for expenses" and how that is to be assessed: no definite sum is given. Certain property which is detailed in the deed is hypothecated and the deed says that that property "will be responsible for the expenses of Pandit Tribhuwan Dat where-ever and to whomsoever it is transferred". The property scheduled differs, save and except one house, from the property scheduled in deed A.

We have tried to see whether deed B can come within any of the deeds set out in schedule I of the Indian Stamp Act, but we cannot find any article which exactly covers the deed.

Looking broadly to the two documents, we are satisfied that the deed B is one which comes within section 4 of the Indian Stamp Act. The transaction before the parties may fairly be said to come within the word "settlement". The two instruments were intended by the parties to be employed in completing this one transaction and the principal instrument as determined by the parties has been stamped and more than sufficiently stamped.

Deed B has in our opinion been properly stamped and more than sufficiently stamped in accordance with the provisions of section 4 of the Act.

We have not overlooked the fact that in dealing with an Act of this kind we have to construe the Act in favour of the subject.

Let a copy of this our judgement be sent to the Chief Controlling Revenue Authority, *i. e.*, to the Board of Revenue, as our opinion on the matter referred to us.

APPELLATE CIVIL.

1915
February, 11.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

BUDDHU AND OTHERS (DEFENDANTS) *v.* DIWAN AND OTHERS (PLAINTIFFS.)*

Act No. IX of 1908 (Indian Limitation Act), section 5—Limitation—Appeal—Discretion of Court—Barrister—Liability for negligence.

Held that an appeal will lie on the question of limitation where the lower appellate Court in admitting the appeal to it under section 5 of the Indian Limitation Act has not exercised a judicial discretion.

The mere fact that the papers of the case and a fee of some sort had been left with a legal practitioner in order that he might file an appeal, but that he had not done so and had returned the papers only after the expiry of the period of limitation, would not be in itself a sufficient ground for admitting an appeal 37 days beyond time.

Per RICHARDS, C. J.—*Semble* that if an advocate who is a barrister or other professional gentleman receives and accepts instructions to file an appeal or make an application and the client loses his right to appeal or make the application as the result of the negligence of the barrister or practitioner to file the appeal or application within time, such barrister or vakil would be liable to his client in a court of law.†

THIS was an appeal under section 10 of the Letters Patent from the decision of a single Judge of the Court. The facts of the case are fully set forth in the judgement under appeal, which was as follows:—

"This is an appeal arising out of a suit for damages for malicious prosecution in respect of a charge made by defendant No 1 against the plaintiffs under section 347 of the Indian Penal Code. The other defendants are said to be the instigators and abettors of the charge. The claim was laid at Rs. 1,142. The court of first instance found that the charge was false and groundless and made maliciously and without reasonable and probable cause. It decreed the claim for Rs 305 on account of damages. The learned Judge in appeal reversed the decree of the learned Subordinate Judge and has dismissed the suit. The plaintiffs have appealed to this Court. The first ground raised in the appeal is that the appeal filed by the defendants in the court below was filed long after the expiration of the period of limitation prescribed by law for the institution of appeals, and that no explanation had been given for the delay in the institution thereof which, in law, could be regarded as sufficient and adequate under section 5 of the Limitation Act of 1908. Now the facts of the case so far as they bear on this point are as follows. The learned Subordinate Judge pronounced his judgement in the case on the 2nd of December, 1912, and a decree bearing that date was prepared in accordance with law. Applications

* Appeal No. 72 of 1914, under section 10 of the Letters Patent.

[† See *Alston* v *Pitambar Das*, I.L.R., 25 All., 509. Ed.]

he was to file the appeal only if he thought there was a fair chance of success, or to file it regardless of the possible result. I cannot understand a member of the bar of Mr. Weston's position not filing the appeal unless his instructions justified him in not filing it in the circumstances of this case. It is not suggested that there was any misapprehension on the part of Mr. Weston as to the time within which the appeal ought to have been lodged, or that the defendants were misled by anything done by the plaintiffs appellants. "Quoting LORD DAVEY, from another case, COLLINS M.R. made the following observations in *In the matter of Coles and another* (1):—'Upon the question whether time ought to be extended, speaking for myself, I am inclined to adopt the view of the late JAMES L. J., that a party has a vested right in an order of the court in his favour and ought not to be deprived of an advantage given to him by the rules, unless there has been on his part some conduct raising an equity against him or in a case of inevitable accident'. As observed by JENKINS, C. J., in *Karsondas Dharamsey* v. *Gangabai* (2), 'when the time for appealing is once passed, a very valuable right is secured to the successful litigant, and the court must therefore be fully satisfied of the justice of grounds on which it is sought to obtain an extension of the time for attacking the decree, and thus perhaps depriving the successful litigant of the advantages he has obtained.' It was, therefore, for the defendants to make out very cogent grounds for excusing this long delay. It might be perhaps suggested that they had done all they had to do on their part in handing over the papers to Mr. Weston and supplying him with the necessary costs for filing the appeal, and that it was due to the accident of Mr. Weston either carelessly or deliberately not filing the appeal. But it has not been stated what Mr. Weston's instructions were. I cannot impute any negligence or carelessness on the part of Mr. Weston on the materials now on the record.

"The learned Judge of the court below did not apparently subject the explanation of the delay to any scrutiny. It appears that on the 7th of December, 1912, he had held in a complaint filed by one Bishambhar Sahai against Buddhu under section 211, Indian Penal Code, which had resulted in a conviction of the latter, that there were no grounds for such conviction He had held that Buddhu was not able to prove his criminal charge against the present defendants and Bishambhar Sahai and reversed the conviction of Buddhu in appeal. He was already predisposed to consider Buddhu's case favourably, and he admitted the appeal without much scrutiny, and on the appeal coming on for hearing he admitted a copy of his judgement in the criminal appeal as he says '*to save a remand*' That judgement was no evidence against the present appellants, either of the facts found or of the conclusion at which the Judge had in that case finally arrived. The case of *Palakdhari Singh* (3) points out the limits within which a judgement not *inter partes* might be used. He took it in only to save a remand (I presume for the purpose of supplying evidence in justification of the charge, which did not exist on the record).

(1) (1897) L. R., 1 K. B., 1. (2) (1905) I. L. R., 30 Bom., 329.
(3) (1889) I. L. R., 12 All., 1.

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"I have no hesitation in holding that the explanation given of the delay in filing the appeal was utterly inadequate.

"The only question which has pressed itself on my attention, is whether I should now in appeal set aside the order of the learned Judge admitting the appeal and excusing the delay.

"If the learned Judge had really exercised a discretion upon proper materials, I should not have reconsidered the matter at all. It is evident from what I have already said that the learned Judge had not really applied his mind to consider the explanation of the delay in presenting the appeal after the 3rd of January, 1913. No explanation was given to him as to why Mr. Weston had not filed the appeal within time. He had, therefore, no opportunity of considering the sufficiency or otherwise of the reason for that fact. They were as unexplained to him as they are to me. In the absence of any explanation of this fact I think that he was, as I am, bound to reject the appeal as time-barred.

"I, therefore, set aside the decree of the lower appellate Court and reject the appeal to that court as time-barred. I restore the decree of the court of first instance with costs in all courts.

The defendants appealed.

Mr. *R. K. Sorabji*, for the appellants.

The Honble Dr. *Tej Bahadur Sapru*, for the respondents.

RICHARDS, C. J.—The facts connected with this appeal are fully reported (see 12 A. L. J., 837). It appears that a suit was brought before the Additional Subordinate Judge claiming damages for malicious prosecution. The suit was decreed in part on the 2nd of December, 1912. Copies of the decree and judgement were delivered to the defendant on the 10th of December. The defendant had up to the 3rd of January, 1913, to appeal to the District Judge. No appeal was filed until thirty-seven days after that date. An application was then made to admit the appeal though late. The appeal was admitted. The only fact that the learned District Judge had before him when admitting the appeal was set forth in an affidavit in which it was stated that instructions had been given to Mr. Weston, a barrister, together with a sum of Rs. 40, for the purpose of filing an appeal. No affidavit of Mr. Weston was filed. No explanation was given why Mr. Weston did not file the appeal. Nor was it even alleged that the non-filing of the appeal to the District Judge was due to Mr. Weston's negligence. Under these circumstances the learned Judge of this Court considered that the District Judge had not exercised a judicial discretion when allowing the appeal to be filed after time. I do not think that we would be justified in

setting aside the decree of this Court. Even if the non-filing of the appeal were due to the neglect of Mr. Weston, the court could hardly lay down a general rule that the neglect of the legal practitioner engaged is always to be deemed a sufficient reason for admitting an appeal or application after the time prescribed by law.

It is suggested that if that appeal is not admitted the client has no remedy because no suit lies against a barrister for neglect. I do not at all agree to the suggestion. I do not wish to be taken as expressing any opinion as to whether or not Mr. Weston was negligent. It may have been that he got some special instructions from this client as to the filing of the appeal. But in my opinion if it was shown that an advocate who is a barrister or other professional gentleman, received and accepted instructions to file an appeal or make an application and the client lost his right to appeal, or make the application as the result of the negligence of the barrister or practitioner to file the appeal or application within time, such barrister or vakil would be liable to his client in a court of law.

I would dismiss the appeal.

BANERJI, J.—I also am of opinion that the appeal should be dismissed. The learned Judge in the court below did not subject the reason alleged for the delay of thirty-seven days in the filing of the appeal to such scrutiny as he was bound to do. He must, therefore, be taken not to have exercised a judicial discretion in admitting the appeal beyond time. On this ground alone I would hold that the learned Judge of this Court was justified in reversing the decision of the learned District Judge. I do not think it necessary to express any opinion on the other point touched upon by the learned Chief Justice in his judgement.

BY THE COURT:—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Chamier and Mr. Justice Piggott.

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February, 16.

DUMI CHAND (PETITIONER) v. ARJA NAND AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code (1908), order XLIII, rule 1—Appeal—Order dismissing an application to be substituted in an appeal in place of the original plaintiff.

Held that an order dismissing an application to be brought upon the record as a plaintiff is not a decree and no appeal lies against such an order.

THE facts of this case were, briefly, as follows:—

During the pendency of an appeal arising out of a civil suit the plaintiff appellant died leaving a widow. Thereupon one Dumi Chand, alleging himself to be the adopted son and the legatee of the deceased appellant, applied to be substituted in the appeal in place of the original plaintiff. The court dismissed his application on the merits. He appealed against this order. The court had passed no order abating or dismissing the appeal.

Munshi *Parmeshwar Dayal*, for the respondents, took a preliminary objection that no appeal lay under order XLIII, rule 1, of the Code of Civil Procedure from the order of the lower court, which was passed under order XXII, rule 5. The old Code allowed an appeal, under section 388, clause (18). But in enacting the new Code the Legislature had deliberately omitted the remedy of an appeal in such cases. No order had yet been passed abating or dismissing the appeal. If the widow so chose she could apply to be substituted in place of the original plaintiff and the appeal would continue.

Mr. *Nihal Chand*, for the appellant, in reply to the preliminary objection urged that the order passed by the lower court must be deemed to have been made under rule 9 or rule 10 of order XXII of the Code of Civil Procedure and therefore an appeal lay under order XLIII, rule 1. Should the order be considered not to have been made under either of these two rules the case might be taken up as an application in revision. The lower court had acted with material irregularity.

CHAMIER and PIGGOTT, JJ.—This is an appeal against an order of the Additional Judge of Saharanpur, dismissing the appellant's application to be made plaintiff in the suit in the place of Nihal Singh deceased, the original plaintiff. The defendants respondents contend that no appeal lies. In our opinion the

* First Appeal No. 114 of 1914 from an order of Banke Behari Lal, Additional Judge of Saharanpur, dated the 19th of May, 1914.

contention is well founded. It is not suggested that the order amounts to a decree as defined in the Code. As an order it is certainly not appealable, for it was not passed under either rule 9 or rule 10 of order XXII. We were asked to treat the appeal as an application for revision. We are not prepared to do this. The court below does not appear to have acted without jurisdiction or with material irregularity in the exercise of its jurisdiction. Moreover, Nihal Singh left a widow, who appears to be his legal representative, if the appellant is not the adopted son, and who may yet succeed in getting herself made plaintiff in place of her deceased husband. It may also be possible to appeal against the order of the court, when passed, dismissing the suit as having abated. There are two reported decisions of this Court that no such appeal lies, but the Bombay and Madras High Courts have held that such an order is tantamount to a decree and is appealable as such.

The present appeal is dismissed with costs.

Appeal dismissed.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

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February, 1[?]

GANGES SUGAR WORKS LD. (PLAINTIFF) v NURI MIAH (DEFENDANT)*.

Act No. VI of 1882 (Indian Companies Act), sections 67, 96 and 123—Contracts entered into by companies—Agreement to refer to arbitration—Whether seal of the company necessary.

Held that section 96 of the Indian Companies Act, 1882, did not require that an agreement entered into by a company with a person who held a contract for the working of a certain portion of the company's business, to refer disputes which might arise between the parties to arbitration, should be made under the seal of the company.

THE facts of this case were as follows :—

The plaintiff was a company registered under the Indian Companies Act and carried on the work of manufacturing sugar in the district of Unao. The registered office of the Company was situated at Cawnpore. The parties entered into a partnership by an agreement, dated the 7th of February, 1912, to work the refinery. One of the conditions of the contract was that should any dispute arise between the parties concerning the working of

* First Appeal No. 81 of 1914, from a decree of Murari Lal, Subordinate Judge of Cawnpore, dated the 22nd of December, 1913.

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the refinery, it should be referred to the arbitration of Lala Hazari Lal, whose decision should be final. Disputes arose between the parties, and the plaintiff brought this suit praying that the agreement may be made a rule of court. The defence, among others, was that the agreement, not having been made under the common seal of the Company as provided for by section 96 of the Indian Companies Act, was illegal and could not be filed in court. The court below dismissed the suit. The plaintiff appealed to the High Court.

Mr. *W. Wallach* (with him Pandit *Kailas Nath Kathju*) for the appellant:—

The provisions of the Indian Companies Act have been taken from the English Act which was then in force (25 and 26 Vic., Chap. 89). Section 72 is a section similar to section 69 of the Indian Act. That section was enacted to incorporate the provisions of the Railway Companies' Arbitration Act, which was never applied to India. Moreover, that section applied to cases between company and company. The provisions of section 69 were only enacted for the protection of the share-holders of the company, and if anybody could take advantage of the section it was one of the share-holders. Any other person could not plead that the contract was not made under the provisions of the Companies Act. The section does not exclude the common law rights of the company. If the section had not been enacted the company would have a right to enter into such a contract. The Legislature, in the absence of express words to this effect, could not be deemed to have taken away a right which was in existence. If the section means anything it means that if the company wishes to enforce a contract in the special manner provided for under the Act then the contract should be under seal. In this case the Managing Director was empowered by a power of attorney to enter into contracts on behalf of the Company. He has signed the contract in dispute. Under section 67 *(h)* any person could be authorized by the company to enter into contracts on its behalf. Under that section the contract is valid. Section 96 of the Indian Companies Act only applies to cases where disputes have already arisen and not to cases where there is a general contract to refer future disputes.

Babu *Durga Charan Banerji* (for Dr. *Satish Chandra Banerji*) for the respondent :—

Section 96 applies to two different kind of cases, viz. (1) references between company and company and (2) references between a company and a person. The provisions of section 123 apply to both kind of cases. We find that the Companies Act provides that contracts to refer disputes should be entered into in a particular manner. I submit that it means that they cannot be entered into in any other manner. The general provisions of the Code of Civil Procedure do not apply to cases of companies. If the Legislature intended that the provisions of the general law were to apply to companies also, the enactment of the section 96 would not be necessary. I, therefore, submit that the word 'may' in section 96 means 'shall.' The provisions of a legislative enactment should be strictly construed. The section was enacted to restrict the power of the Company and not to enlarge it. An application to file the reference could only be made to High Court. Section 96 was enacted in Part III which begins with section 63. In that came the provisions for protection of creditors (67) and of members (74). Contracts entered into by the company, the legal proceedings which were to be filed by or against them and references to arbitration are all dealt with in that Part (III). The Act therefore is exclusive and the provisions of general law will not apply to cases which come under that Act.

Mr. *W. Wallach*, was not heard in reply.

RICHARDS, C. J., and BANERJI, J.—The facts connected with the case out of which this appeal arises are shortly as follows. The plaintiff company entered into a contract with the defendant in connection with the working of a certain portion of the company's property or business. One clause of this contract was that in the event of disputes or differences arising they should be referred to the arbitration of a gentleman named Hazari Lal, and that his decision should be binding and conclusive between the parties. This contract was not under seal. Disputes having arisen, the company made an application under schedule II, rule 17, of the Code of Civil Procedure to file the contract as a submission to arbitration in order that the matter should be settled

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GANGES SUGAR WORKS LD., v. NURI MIAH.

in accordance with the provisions of the Code. This application was refused by the court below on the sole ground that the contract which contained the submission to arbitration was not under the seal of the company. At present we have nothing to do with the merits of the dispute between the parties. We have only to decide whether or not the court below was wrong in refusing the application on the ground mentioned above. Section 67 of the Indian Companies Act, VI of 1882, (which was in force at the time), provides for the manner in which contracts can be entered into by companies. It is admitted by both sides that the present contract, (save *the particular clause which refers to* arbitration,) was a contract which the company was entitled to enter into without its being under seal. It is quite clear that if section 67 stood alone, the contract to refer to arbitration also did not require to be under seal. It is contended, however, that it necessarily follows from the provisions contained in section 96 and the subsequent sections down to section 123 that an agreement to refer disputes to arbitration by a company to be legal must necessarily be under seal. Section 96 is as follows:—"Any company under this Act *may*, from time to time, by writing under its common seal, agree to refer and may refer, to arbitration any matter whatsoever in dispute between itself and any other company or *person*; and the companies parties to the arbitration may delegate to the person or persons, to whom the reference is made, power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by the directors or other managing body of such companies."

This section (96) is largely taken from the English Companies Act (25 and 26 Victoria, Chapter 89), section 72 of which is as follows:—"Any company under this Act may from time to time by writing under its common seal, agree to refer and may refer to arbitration, in accordance with the Railway Companies Arbitration Act, 1859, any existing or future difference, question or other matter whatsoever in dispute between itself and any other company or person, and the companies parties to the arbitration may delegate to the person or persons to whom the reference is made, power to settle any terms or to determine any matter

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capable of being lawfully settled or determined by the companies themselves or by the directors or other managing body of such companies."

Section 73 is as follows:—"All the provisions of the Railway Companies Arbitration Act, 1859, shall be deemed to apply to arbitrations between companies and *persons* in pursuance of this Act; and in the construction of such provisions the companies shall be deemed to include companies authorized by this Act to refer disputes to arbitration."

The Railway Companies Arbitration Act, 1859, was an Act providing for the settlement of disputes between Railway Companies *inter se.* It contains more or less elaborate provisions for the manner in which such arbitrations should be carried out. The provisions to which we have referred of the English Companies Act incorporated these provisions and made them applicable, not only to disputes between different companies but also to disputes between a company and *an individual.* It was evidently the intention of the Indian Legislature to do much the same thing by the Indian Companies Act of 1882. Sections 97-122 are for the most part adaptations of the Railway Companies Arbitration Act to which we have already referred. It was neglected, however, to expressly make these sections applicable to disputes between companies and *individuals.* It seems as if this is an example of clumsy drafting, but the matter is no longer of any very great importance because under the present Indian Companies Act, VII of 1913, provision is made for companies entering into arbitration *in accordance with the Indian Arbitration Act.* It seems to us that the question resolves itself into the proposition—do the provisions of section 96 necessarily imply that a company cannot, save under seal, enter into a contract to refer a contract which, but for the provisions of the section, it could have entered into, namely, to submit its possible future disputes to the arbitration of a named arbitrator. It seems to us that there is no such necessary implication. The words are that "the company *may* from time to time, &c." It was probably the intention of the Legislature when providing for the method in which a particular arbitration should be carried out to give the parties the option of having the arbitration in accordance with

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the Act if they thought fit. It is, however, unnecessary now to speculate as to what was the real intention. From the change that has been made in the law the provisions of the Act of 1882 evidently were found to be inapplicable to the conditions of the country. We think that the contract in the present case to refer to arbitration any future disputes which might arise between the company and the defendant was not an illegal contract but a contract which can be given effect to in the ordinary way. It is quite clear that section 123 only applies to submissions to arbitration which have been made in accordance with the provisions of the Act.

We accordingly allow the appeal, set aside the decree of the court below and remand the case to that court with directions to re-admit it upon its original number in the file and to proceed to hear and determine the same according to law having regard to what we have said above. Costs here and heretofore will be costs in the cause. The record may be sent down so that the court below may dispose of the case as soon as possible.

Appeal decreed and cause remanded.

Before Mr. Justice Tudball and Mr. Justice Rafiq.

1915
February, 17.

RANG LAL KUNWAR AND OTHERS (JUDGEMENT-DEBTORS), v. KISHORI LAL AND OTHERS (DECREE-HOLDERS).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 20 (2)—*Occupancy holding—Transfer—Mortgage executed before the Act came into force—Execution of decree.*

A usufructuary mortgage of an occupancy holding executed before the coming into force of the Agra Tenancy Act, 1901, is a good mortgage. *Babu Lal* v. *Ram Kali* (1) and *Harbans Rai* v. *Sri Niwas Rao* (2) followed.

Where, therefore, the mortgagee, not having obtained possession under such a mortgage, gets a decree for possession, the judgement-debtor cannot set up section 20 of the Act as a bar to its execution.

THE facts of this case were as follows:—

An occupancy holding was usufructuarily mortgaged on the 25th of January, 1900, to one Dwarka Prasad, whose interest subsequently

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* Second Appeal No. 1002 of 1914, from a decree of Ram Prasad, District Judge of Ghazipur, dated the 14th of April, 1914, reversing a decree of Muhammad Husain, Subordinate Judge of Ghazipur, dated the 15th of December, 1913.

(1) (1906) 3 A. L. J., 40. (2) (1911) 8 A. L. J., 1301.

devolved upon the present decree-holders, Kishori Lal, and others. Possession was not given to the mortgagee, who brought a suit in which he sought in the alternative either to recover his money or get possession of the property. On the 6th of June, 1912, a decree for possession was awarded to the mortgagee as such. An objection was taken in the course of the suit by the defendants that the transfer was illegal and that the plaintiffs were not entitled to possession. The court decided in favour of the mortgagee, holding that the mortgage was valid and that the plaintiffs as such were entitled to possession and accordingly it gave a decree for possession. Having obtained the decree, execution was sought, and again the judgement-debtors came forward and pleaded that possession could not be given to the decree-holders in execution of the decree by reason of section 20 of the Tenancy Act. The Subordinate Judge allowed this plea and dismissed the application. The lower appellate court set aside the decision of the first court and ordered possession to be delivered to the decree holders in execution of the decree. The judgement-debtors appealed to the High Court.

Mr. *M. L. Agarwala*, for the appellants.

Munshi *Damodar Das*, for the respondents.

TUDBALL and RAFIQ, JJ.—This is a second appeal by the judgement-debtors. An occupancy holding was usufructuarily mortgaged on the 25th of January, 1900, to one Dwarka Prasad, whose interest has now devolved upon the present decree-holders, Kishori Lal, &c. Possession was not given to the mortgagee, who brought a suit in which he sought in the alternative either to recover his money or get possession of the property. On the 6th of June, 1912, a decree for possession was awarded to the mortgagee, as such. An objection was taken in the course of the suit by the defendants that the transfer was illegal and that the plaintiffs were not entitled to possession. The court decided in favour of the mortgagee, holding that the mortgage was valid and that the plaintiffs as such were entitled to possession and accordingly it gave a decree for possession. Having obtained the decree execution was sought, and again the judgement-debtors came forward and pleaded that possession could not be given to the decree-holders in execution of the decree by reason of section 20 of

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RANG LAL KUNWAR v. KISHORI LAL.

the Tenancy Act. The Subordinate Judge allowed this plea and dismissed the application. The lower appellate court has set aside the decision of the first court and has ordered possession to be delivered to the decree-holders in execution of the decree. The judgement-debtors come here in second appeal, and it is urged that, whatever may have been decreed, still clause (2) of section 20 says clearly that the interest of an occupancy tenant is not transferable in execution of a decree of the Civil Court and therefore the Civil Court's decree cannot be executed. In view of the decision of this Court in the case of *Babu Lal* v. *Ram Kali* (1) and in *Harbans Rao* v. *Sri Niwas Rao Kalin* (2), the plea has absolutely no force at all. It has been decided as between the parties finally in the course of this suit that the plaintiffs are entitled to possession. The decree has been obtained. Under the rulings of this Court the mortgage, which was made before the present Tenancy Act came into force, was a good one and the mortgagee was therefore entitled to enforce his decree. Over and above this the executing court cannot go behind the decree. That decree states that the plaintiff shall be put into possession and the court is bound to execute it. There is no force in the appeal, we dimiss it with costs.

Appeal dismissed.

1915
February, 18.

Before Sir Henry Richards, Knight; Chief Justice, and Justice Sir Pramada Charan Banerji.

SUNDAR KUNWAR (PLAINTIFF) *v.* DINA NATH AND OTHERS (DEFENDANTS)*

Act (Local) No. II of 1901, *(Agra Tenancy Act), sections* 4 *and* 19—*Question of proprietary title—Jurisdiction—Civil and Revenue Courts*—Res judicata.

In a suit for ejectment in a Revenue Court (Assistant Collector) the defendants pleaded that the plaintiff "brought them from their village and established them in the property promising that they should have the property in suit." The Revenue Court found that these were the true facts, and came to the conclusion that the defendants were "rent-free holders of the land in suit, which was given to them in gift by the plaintiff." The plaintiff appealed to the Commissioner, who confirmed the finding of the Assistant Collector.

Held that the plaintiff could not reopen in a Civil Court the question of the defendants' right to the land, inasmuch as the decision of the Assistant Collector

* First Appeal No. 318 of 1913, from a decree of Ganga Sahai, Subordinate Judge of Moradabad, dated the 2nd of May, 1913.

(1) (1903) 3 A. L. J., 40. (2) (1911) 8 A. L. J., 1301.

had become final, no appeal having been made to the proper Court, namely, the District Judge. 1915

Shahzade Singh v. *Muhammad Mehdi Ali Khan* (1), *Bed Saran Kunwar* v. *Bhagat Deo* (2) and *Beni Pandey* v. *Kausal Kishore* (3), referred to. SUNDAR KUNWAR v. DINA NATH.

THE facts of this case were as follows:—

In 1910 the plaintiff brought a suit against the defendants in the Revenue Court for their ejectment from the land in suit on the ground that they were her sub-tenants. The suit was dismissed, the court holding that the defendants were rent-free grantees and donees of the land in suit. The plaintiff appealed to the Commissioner, who dismissed the appeal. She then brought another suit for recovery of rent, and this suit was also dismissed by the District Judge on the ground that the matter had been finally decided in the first suit. The plaintiff thereupon brought the present suit in the court of the Subordinate Judge, for a declaration, that the defendants were not rent-free grantees holding the land from the plaintiff but were trespassers and were liable to ejectment. The Subordinate Judge dismissed the suit. The plaintiff appealed to the High Court.

Mr. *B. E. O'Conor* (with him Dr. *Surendra Nath Sen*), for the appellant, submitted that the lower court was wrong in holding that the suit was not cognizable by a Civil Court. It was a suit for ejectment of trespassers and as such exclusively triable by the Civil Court. In the first suit the issue that properly arose on the defence was whether the relation of landlord and tenant subsisted between the parties. Anything found beyond the issue raised was only *obiter* and could not bind the parties. The whole question was whether a rent-free grantee can be called a proprietor. It was submitted that he was not a proprietor and the defence that the defendants were rent-free grantees was not a defence raising a question of proprietary title. The decision of the Revenue Court did not therefore operate as a bar to the decision of the present suit.

Pandit *Mohan Lal Sandal*, for the respondents, submitted that the defence in the first suit raised a *bonâ fide* question of title which was properly decided by the Revenue Court. The plaintiff could have appealed against that decision to the District

(1) (1900) I. L. R., 22 All., [illegible] (2) [illegible] I. L. R., [illegible]

(3) [illegible] I. L. R., [illegible] All., 22

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Judge. She did not adopt that course and allowed the decision to become final. The present suit was therefore barred. He relied on *Salik Dube* v *Deoki Dube* (1), *Beni Pandey* v. *Kausal Kishore* (2), *Shahzade Singh* v. *Muhammad Mehdi Ali Khan* (3) and *Bed Saran Kunwar* v. *Bhagat Deo* (4).

Mr. *B. E. O'Conor* was heard in reply.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit for ejectment. A suit was instituted by the plaintiff in the Revenue Court in the year 1909 or 1910, in which the plaintiff alleged that the defendants were her tenants and she sought to eject them for non-payment of rent. In that case the defendants pleaded that the plaintiff had given them the property. The Assistant Collector held that the story told by the defendants was correct, namely, that the plaintiff having no issue of her own brought them from their village and established them on the property promising that they should have the property now in suit. Having found that these were the true facts he concludes by saying "under these circumstances I find the defendants are rent-free-holders of the land in suit which was given to them in gift by the plaintiff." The plaintiff appealed to the Commissioner (not to the District Judge). The Commissioner held in effect exactly the same as the Assistant Collector had held. Meanwhile, a second suit had been brought by the plaintiff for rent, also in the Revenue Court. This suit has been dismissed as being a matter which was already decided in the suit to which we have already referred. The plaintiff then instituted the present suit in the Civil Court. The court below has dismissed her suit on the ground that the previous proceedings bar the suit.

It seems to us that the decision of the court below was correct. The plea of the defendants in the first mentioned suit was clearly a plea that they were the proprietors. Two courses were open to the Revenue Court. It could decide the question itself, in which case the appeal lay to the District Judge, or it might refer the parties to the Civil Court. From the nature of the issue framed and the finding of the court it seems to us that we must presume that the Revenue Court adopted the first course. It was, therefore

(1) Weekly Notes, 1907, p. 1.

(2) (1907) I. L. R., 29 All., 160.

(3) (1909) I. L. R., 32 All., 8.

(4) (1911) I. L. R., 33 All., 45

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the plaintiff's duty to have appealed to the District Judge if she was dissatisfied with the decision. She did not do so, and therefore the decision of the Revenue Court is final and has the same effect as the decision of the Civil Court. See *Shahzade Singh* v. *Muhammad Mehdi Ali Khan* (1), and *Bed Saran Kunwar* v *Bhagat Deo* (2) also *Beni Pande* v. *Raja Kausal Kishore Prasad Mal Bahadur* (3).

If we were to hold that the decision by the Assistant Collector and Commissioner was that the defendants were rent-free grantees, then the plaintiff's remedy would be under the Tenancy Act to have the rent-free grant resumed. We dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR *v.* ZAHIR SINGH.*

1915 *February*, 19.

Criminal Procedure Code, sections 195 *and* 537—*Sanction to prosecute—Irregularity or illegality—Complaint filed after expiry of the time allowed by section* 195 (6).

Held that the taking cognizance of a complaint in respect of which sanction had been obtained under section 195 of the Code of Criminal Procedure after the expiry of the six months' period allowed by clause (6) of the section and when objection was taken at the earliest opportunity by the accused was more than an irregularity and was not covered by the provisions of section 537 of the Code.

THE facts of this case were as follows :—

One Tika Ram obtained a sanction on the 3rd of March, 1913, to prosecute Zahir Singh and certain others for offences under sections 467 and 471 of the Indian Penal Code. An appeal was filed against the order granting sanction, which was dismissed on the 10th of June, 1913. On the 15th of July, 1913, Tika Ram filed a complaint against those three persons. Proceedings in the case were suspended pending the decision of an application in revision to this Court. That application was rejected on the 21st of January, 1914. Tika Ram then waited, practically for four months, until the 15th of May, 1914, when he went into court and asked that his complaint

* Criminal Revision No. 1228 of 1914 from an order of E. Thomas, Magistrate, 1st class, of Farrukhbad, dated the 27th of November, 1914.

(1) (1903) I. L. R., 32 All., 8. (2) (1911) I. L. R., 33 All., 453.

(3) (1907) I. L. R., 29 All., 160.

1915
February, 19.

MISCELLANEOUS CRIMINAL.

Before Justice Sir George Knox.

EMPEROR *v.* ABDUR RAZZAK AND ANOTHER.*

Criminal Procedure Code, section 193—Transfer—Appeal—"Case"—Powers of Sessions Judge.

Held that the word 'cases' as used in section 193 (2) of the Code of Criminal Procedure does not include appeals. *In re the petition of Mausa Asmal* (1) and *Chattarpal Singh* v. *Raja Ram* (2) followed. *Allah Dei Begam* v. *Kesri Mal* (3) referred to.

THE facts of this case were as follows:—

By an order, dated the 3rd of February, 1915, the Sessions Judge of Cawnpore transferred two criminal appeals, Nos. 7 of 1915 and 14 of 1915 pending in his court to the court of the Assistant Sessions Judge for trial. The section of the Code under which the transfer purported to have been made was section 193, clause (2). This section provides that Assistant Sessions Judges shall try such cases only as the Sessions Judge of the division by general or special order may make over to them for trial. In the opinion of the learned Sessions Judge the word "cases" as used in this clause is not defined and he saw no reason why it should not extend to appeals or other matters. The District Court Government Pleader entertaining doubts as to the validity of this order, the Sessions Judge referred the question to the High Court, and the records were sent for under section 435 of the Code of Criminal Procedure.

KNOX, J.—By an order, dated the 3rd of February, 1915, the Sessions Judge of Cawnpore transferred two criminal appeals, Nos. 7 of 1915 and 14 of 1915 pending in his court to the court of the Assistant Sessions Judge for trial.

The section of the Code which he considered justified this procedure on his part was section 193, clause 2. This section provides that Assistant Sessions Judges shall try such cases only as the Sessions Judge of the division by general or special order may make over to them for trial. In the opinion of the learned Sessions Judge the word "cases," as used in this clause is not

* Criminal Miscellaneous No. 37 of 1915.

(1) (1884) I. L. R., 9 Bom., 165. (2) (1885) I. L. R., 7 All., 661.

(3) (1905) I. L. R., 28 All., 93.

defined, and he saw no reason why it should be confined to "cases" and not extend to appeals or other matters.

This Court has called for the records of the cases in question by the powers conferred upon it by section 435 of the Code of Criminal Procedure. So far as I know the word "case" has never been defined in any General Clauses Act or in the Code of Criminal Procedure, nor am I aware that this particular point has come up to this Court for decision.

In *Chattarpal Singh* v. *Raja Ram* (1) Mr. Justice MAHMUD held that so far as the Code of Civil Procedure was concerned the word "case" should be understood in its broadest and most ordinary sense, including all adjudications which might constitute the subject of appeal or revision. With all due respect I think a safer rule is to consider the word in connection with the particular Code or Law in which it is found. Under the present circumstances there is considerable difficulty in assigning to the word such a broad meaning. The first difficulty will be found in section 409 of the Code of Criminal Procedure. That section deals with appeals. The right of appeal is a creation of statute. Without some particular provision authorizing an appeal no right of appeal is conferred. Even when a right of appeal has been conferred, the court to which such appeal lies must also be specified A right of appeal without any specification as to the court to which such appeal should be preferred would be a useless right.

The appeals with which we are concerned in the present case are appeals created by section 408 of the Code of Criminal Procedure. That section provides for persons convicted on trials mentioned therein, and persons wishing to appeal can appeal to the Court of Session. To find out what a Court of Session is we have to turn to section 9 of the Code of Criminal Procedure; a liberal interpretation of section 9 might bring within the words "Court of Session" not only Sessions Judges but also the Additional Sessions Judge and the Assistant Sessions Judge, if there be any such within the Sessions division. If such an interpretation could be adopted it might be argued that the words "Court of Session" in this section, 408, were wide enough to include all these officers. I pass over the anomaly in such an interpretation of the court of

(1) (1885) I. L. R., 7 All., 661.

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the Assistant Sessions Judge being a court from which appeals lie to the Court of Session. Section 409, by providing that an appeal shall lie to the Court of Session or Sessions Judge and shall be heard by the Sessions Judge or by an Additional Sessions Judge, seems to make it clear that the Legislature intended that all appeals under the Code of Criminal Procedure lying to the Court of Session were to be heard only by the Sessions Judge or by an Additional Sessions Judge.

The Bombay High Court has had occasion to consider this question in more than one case. In *In re the petition of Mausa Asmal* (1) they had to deal with a similar provision contained in sections 17 and 18 of Act No. X of 1872. Mr. Justice WEST held that section 18 clearly was not meant to give a *quasi*-revisional power over the Magistrate of the district and at the same time no appellate jurisdiction. In a reference made by the Sessions Judge of Surat the same High Court held that a Joint Sessions Judge could not try applications under Chapter XXXII of the then current Code of Criminal Procedure. They endorsed the view stated by the Sessions Judge that the Joint Sessions Judge was absolutely precluded from taking action under Chapter 32 of the Criminal Procedure Code, which relates to reference and revisions.

There is another section in the present Code of Criminal Procedure which bears upon the point, and that is section 526. That section provides that the High Court can order "that any particular criminal case or appeal" be transferred from one court to another. If the view taken by the learned Sessions Judge of Cawnpore be correct the word "appeal" used in this section would be pure surplusage. But in section 526 this phrase is used four times over and is again repeated in section 527 of the Code of Criminal Procedure. It will be found that a view similar to this has been taken where the words "case" and "appeal" are to be found in other laws. I will mention only one—*Allah Dei Begam* v. *Kesri Mal* (2).

I entertain no doubt therefore that section 193, clause (*e*), confers on the Sessions Judge no power to transfer appeals to the Assistant Sessions Judge.

(1) (1884) I. L. R., 9 Bom., 165. (2) (1905) I. L. R., 28 All., 93.

I set aside the order passed as being an illegal order and direct that the case of Abdul Razzak and Abdul Shakur be returned to the Sessions Court of Cawnpore for trial by the learned Sessions Judge or by the Additional Sessions Judge of Cawnpore if there be such a Judge in existence at the present time.

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Order set aside.

REVISIONAL CRIMINAL.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

EMPEROR v. ISMAIL KHAN. *

1915 *February*, 26.

Act No. VI of 1898 *(Indian Post Office Act), sections* 19, 61 *and* 70—*Offence—Cocaine—Transmission by post.*

Held that cocaine is not a substance which falls within the purview of section 19 of the Indian Post Office Act, 1898, and it is not an offence under that Act to transmit the same by post.

THIS was a reference made by the Sessions Judge of Kumaun, The facts of the case appear from the order of reference, which was as follows :—

"Ismail Khan appellant has been convicted under section 60 (*a*) of the Excise Act and sentenced to a fine of Rs. 200, and also under section 61/70 of the Post Office Act and sentenced to a fine of Rs. 100. The facts are that the Post Master at Naini Tal received information that a parcel containing cocaine was coming by post addressed to accused. When it arrived on the 23rd of September, 1914, he sent for the police and they had it opened in the presence of the accused who is described as a "trader" or "merchant of Mulli Tal Bazaar." The parcel contained six bottles of cocaine each containing ½ ounce and the fact is clearly proved.

"Accused said in his defence that he did not know the name of the man who sent the cocaine and that it was the act of an enemy. The (Sender) is one Buddhu of Rampur City. Accused belongs to Rampur City. He now admits knowing Buddhu This is because his house was searched and several post cards from Buddhu were found there. He now suggests that two persons both named Bhup Ram may have addressed the parcel to him, but the hand-writing on the parcel is Buddhu Khan's. Besides this there are allusions in the correspondence.—'The box is ready and is only waiting your arrival.' 'Card boards have been searched for among all the recoveries but they cannot be had thither, another search will be made if they can be found they will be sent.' These cryptic phrases are not well explained by the accused. He says the card boards are used in shoe making, but this is denied by the prosecution and there is no evidence of it. He explains the 'hai' as a reply to a jocular allusion of his own.

* Criminal Reference No 73 of 1915.

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I agree with the Magistrate that the hand-writing shows that Buddhu sent it and the previous acquaintance shows that accused ordered it. The sentence of fine only seems inadequate. Accused would not purchase so large a quantity for himself. He must have intended to make a trade of it. The Legislature has recently provided *extra sentences for possession of cocaine and evidently intends* to attempt the suppression of the trade by severe sentences. I therefore direct that the record be forwarded to the High Court with a recommendation that the sentence be enhanced. The point was not taken in appeal, but I have a doubt whether rule 93 (1) of the Post Office Guide has the force of law. It may embody rules made by the Governor General in Council under section 21 of the Post Office Act, but the prosecution cannot show me any publication in the Gazette. Accused's counsel was called on to show cause against an enhancement of sentence, but he had nothing to say."

Mr. *C. J. A. Hoskins*, for the applicant.

The Government Advocate (Mr. *A. E. Ryves*) for the Crown.

RICHARDS, C.J., and BANERJI, J.—Ismail Khan has been convicted under section 60A of the Excise Act and under section 61 read with section 70 of the Post Office Act. On conviction on the first charge he was fined Rs. 200 and on the second one Rs. 100. The learned Sessions Judge, to whom Ismail Khan appealed, has affirmed the convictions, but referred the matter to this Court for the purpose of having the sentences considered with a view to enhancement. Notice was duly served upon Ismail Khan, and he has been represented by Mr. *Hoskins* as counsel. Mr. *Hoskins* on his behalf urges, first, that both convictions were illegal, and that in any event the punishment was sufficient. In our opinion the court below was justified in finding that the accused had been guilty of an offence under section 60A of the Excise Act and that he was rightly convicted. So far as the conviction under section 61 read with section 70 of the Post Office Act is concerned we think that the conviction was not justified by law. Section 70 of the Post Office, Act VI of 1898, provides that any person "who abets the commission of any offence punishable under the Act or attempts to commit any offence so punishable, shall be punishable with the punishment provided for that offence." We have now to see what offence Ismail Khan is alleged to have abetted. Section 61 is the only section referred to. That section provides that "whoever in contravention of the provisions of section 19 or section 20 sends or tenders or makes over in order to be sent by post any postal article or anything shall be punishable with imprisonment for a term which may extend to one year or with fine, or with both." We

have now to see whether any person in contravention of the provisions of section 19 or section 20 sent any article by post. Section 19 is as follows:—Clause (1) "Except as otherwise provided by rule and subject to such conditions as may be prescribed thereby, no person shall send by post any explosive, dangerous, filthy, noxious or deleterious substance, any sharp instrument not properly protected, or any living creature which is either noxious or likely to injure postal articles in course of transmission by post or any officer of the Post Office." Clause (2) "No person shall send by post any article or thing which is likely to injure postal articles in course of transmission by post or any officer of the Post Office." It is quite clear that the provisions of section 20 have no bearing on the case. It seems to us that the provisions of section 19 really deal with the sending of articles or animals by post which will be likely to injure any person occupied in the execution of the Post Office work, or which might be likely to cause injury to articles in the course of transmission through the post It does not seem to aim at the restriction of any trade. It is very hard to say that cocaine could be considered to be an "explosive" or a "dangerous, filthy, noxious or deleterious substance" within the meaning of the section. No doubt the abuse of cocaine may be followed by very serious consequences, but this, it seems to us, is not what the section was intended to provide against. It is said that rules have been made to prevent the sending of these articles by post. The sending of articles by post in contravention of the rules so made does not seem to be an offence under section 61, which only deals with the sending of articles in contravention of section 19 and section 20. We think, therefore, that the accused was wrongly convicted of an offence under the Post Office Act. We think, however, that the sentence under section 60A of the Excise Act was inadequate. We, therefore, set aside the conviction under section 70 read with section 61 of the Post Office Act and acquit the accused of that offence and remit the fine. We enhance the sentence under section 60A of the Excise Act to a sentence of three months simple imprisonment in addition to the fine of Rs. 200. The fine of Rs. 100, if paid, will be refunded.

Order modified.

1915
March, 6.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Rafiq.

JUGGI LAL AND OTHERS (DEFENDANTS) *v.* KISHAN LAL (PLAINTIFF) AND MOOL CHAND AND OTHERS (DEFENDANTS).*

Act No. IX of 1908 *(Indian Limitation Act), schedule I, article* 60—*Limitation—Suit to recover money deposited with a banking firm.*

There is no doubt, since the passing of the Indian Limitation Act, 1908, that a suit for the recovery of money deposited with a banker and repayable on demand is governed by article 60, and not by article 59, of the first schedule to the Act. *Dharam Das* v. *Ganga Devi* (1) referred to.

THIS was a suit to recover money deposited by the plaintiff's father with a banking firm. The facts of the case are fully stated in the judgement of the Court.

The Hon'ble Dr. *Sundar Lal*, The Hon'ble Dr. *Tej Bahadur Sapru* and Munshi *Gulzari Lal*, for the appellants.

Mr. *B. E. O'Conor*, Mr. *W. Wallach*, and Pandit *Shiam Krishna Dar*, for the respondents.

TUDBALL and RAFIQ, JJ.—This is an appeal by one set of defendants as against the plaintiff and the second set of defendants and arises out of a suit for the recovery of money brought in the following circumstances.

The plaintiff's father used to deposit sums of money on interest with the firm of Baij Nath Ram Nath until his death in August, 1897. He left him surviving his widow and the plaintiff his son, who was then a minor, and who at the date of the present suit in 1912 was about 19½ years old. Payments of various sums on account were made by the firm to the plaintiff's mother from time to time up to the year 1905.

In this year the firm of Baij Nath Ram Nath, which was a joint family concern, split up into two firms, owing to a separation of the family. These two new firms were Baij Nath Juggi Lal, represented by the present appellants, and Baldeo Das Kedar Nath, represented by the second set of defendants respondents.

The two branches divided up not only their properties but also their liabilities. Each of the new firms took over those liabilities which were due to relations more closely connected to it than to

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* First Appeal No. 241 of 1913 from a decree of Murari Lal, Subordinate Judge of Cawnpore, dated the 21st of April, 1913.

(1) (1907) I. L. R., 29 All., 773.

the other firm. For this reason the second set of defendants took over the liability for the debt due to the plaintiff, inasmuch as the plaintiff's father's sister was the wife of Kedar Nath. The defendant Murli Dhar *alias* Mul Chand (of the second set) is the son of Kedar Nath, and he has in clear terms admitted that his branch took over this liability.

It is also a fact that after the partition a number of payments were made to the plaintiff's mother, and they were all made by the branch firm of Baldeo Das Kedar Nath. When the plaintiff came of age (eighteen years) he asked for payment of the amount standing to his credit. Both branches refused payment, the present appellants stating that they were no longer liable and that the plaintiff must seek his remedy against the second set of defendants.

The plaintiff has accordingly sued both sets of defendants.

The pleas raised in defence by the present appellants with which we are now concerned in this appeal were three in number, no others having been pressed before us. The first was that at the time of the separation the liability in question was taken over by the second set of defendants and the plaintiff's mother expressly consented to this and agreed to look to Baldeo Das Kedar Nath for payment. The plaintiff is bound by this consent and the appellants are no longer liable for the money. The next is that the suit is barred by limitation. The third is that the appellants are entitled to set off a sum of money about Rs. 5,100.

The Subordinate Judge held as follows :—

(1) that the evidence was insufficient to prove the alleged consent of the mother,

(2) that the suit was not barred by limitation,

(3) that the defendants had failed to prove that any sum as mentioned was due from the firm of Jodh Ram Chunni Lal, for which the plaintiff's father was liable and which the appellants were entitled to debit to the account of the plaintiff. He repelled the other defences and gave the plaintiff a decree for the sum of Rs. 13,231-10-3 with future interest and costs.

The above three pleas are again pressed before us.

Taking first the question of the mother's alleged consent and assuming that it would be binding, if proved, on the plaintiff, we

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find ourselves unable to hold that the evidence establishes beyond reasonable doubt that the mother actually came to such an agreement as is contemplated in section 62 of the *Contract Act.*

The only evidence is the statement of Lala Juggi Lal alone and the fact that after the separation whatever payments were made to the mother were made by Murli Dhar. Murli Dhar states openly that as between his branch and the appellants the former alone is liable if the suit be not barred by limitation, but he denied that the plaintiff's mother was a party to the agreement between the two branches. Lala Juggi Lal's evidence is too vague and wanting in detail to carry conviction to our minds that the widow gave any intelligent consent to the agreement. We doubt very much that she could have understood the legal effect thereof, and she at the most probably merely did as she was told to do in going to Murli Dhar for money. The alleged novation is not proved.

The next question is that of limitation. It is urged that under article 59 of the Act of 1877, the present claim had become time-barred before the present Act had come into force and that under the ruling of this Court in *Dharam Das* v. *Ganga Devi* (1), article 59 of the Act of 1877 applied to the circumstances of this case.

The firm of Baijnath Ramnath did banking business and the plaintiff's father deposited his money with them on the condition that interest would be payable and that the banker would repay the money on demand. Article 59 of the Act of 1877 applied to the case of money "lent" under an agreement that it shall be payable on demand. Article 60 referred to the case of money "deposited" "under an agreement that it shall be payable on demand."

The basis of the decision in *Dharam Das* v. *Ganga Devi* (1), was that the ordinary dealings between a native banker and his customers are in the nature of loans made by the latter to the former.

In the course of their judgement the learned Judges said:—"It is far from easy to say to what class of cases the Legislature meant article 60 to apply. It may apply to the transactions between a banker and his customers known as 'fixed deposits.' Or it may apply only to deposits of money made with a private person."

(1907) I. L. R., 29 All., 773.

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They pointed to the conflict of authority on the question and referred to an unreported decision in F. A. No. 96 of 1882, decided on the 4th of April, 1885, as a guide, and held that article 59 applied Personally we have doubts as to the correctness of the decision.

Article 60 was a new article and appeared for the first time in the Act of 1877 and drew a distinction between money "*lent*" and money "*deposited*" under an agreement that it shall be payable on demand. In the one case the time began to run from the date of the loan and in the other case from the date of the demand. It seems to us that it was necessary to see in each case whether in fact the transaction was a loan or what in ordinary banking language is known as a "deposit." It does not suffice to say that a deposit is in the nature of a loan. Every deposit, fixed or otherwise, is in the nature of a loan in a banking concern, but the Legislature, it seems to us, clearly wished to draw a distinction between the ordinary loan and that class of loan usually known as a deposit when it introduced article 60 for the first time. None of the parties to this suit have called the present transaction a loan. They all speak of it as a deposit in the usual banking sense, and it can easily be distinguished from an ordinary loan. However, it is apparent that there was considerable conflict of opinion. The various cases are noted in the judgement in *Dharam Das* v. *Ganga Devi* (1). The Limitation Act of 1877 has now been replaced by the Act IX of 1908, and it is evident from the addition made therein to the language of article 60, that the Legislature had before it this conflict of opinion, and, to make its intention clear and remove the doubt, added the words "including money of a customer in the hands of his banker so payable" to article (60). In our opinion this was no alteration of the law, but only language used to make clear the real intention of the Legislature when in 1877 it for the first time enacted article 60. The Legislature having thus stepped in and made its meaning clear, there is no necessity for us to refer the point for decision of a larger Bench.

We therefore hold that article 60 does apply. Time began to run from the date of the demand, and, as the suit was brought

(1) (1907) I. L. R., 23 All., 773.

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within three years thereof, there is no bar of limitation in favour of either set of defendants.

The third plea is that the defendants are entitled to deduct the sum of about Rs. 5,100, which was due from the firm of Jodhraj Chunni Lal. The story is that the plaintiff's father Ram Chandra, when he deposited money with Ramnath Baijnath, was in the employment of the firm of Jodhraj Chunni Lal, that the two firms began to deal with each other and Ram Chandra agreed that his money should be security for any sum which might fall due to Ramnath Baijnath from Jodhraj Chunni Lal and that any such sum should be deducted when the money of Ram Chandra was repaid. We agree with the court below that the evidence on the point is most unconvincing. As a matter of fact the sum which Jodhraj Chunni Lal owed to Ramnath Baijnath was actually written off by the latter firm as a "bad debt." Ram Chandra died in 1897. At no time has the sum ever been debited to his account, as it most certainly would have been debited if he had stood surety for Jodhraj Chunni Lal. We do not believe the story and the evidence does not convince us and we hold against the appellants. The result of our findings is that the appeal fails and we dismiss it. We award costs to the plaintiff. The second set of defendants who are the persons really at fault in the matter will bear their own costs of this appeal.

Appeal dismissed.

1915
March, 10.

Before Mr. Justice Tudball and Mr. Justice Rafiq.

CHHABILE RAM AND ANOTHER (PLAINTIFFS) *v.* DURGA PRASAD AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), *section 92—Public trust—Suit instituted by two plaintiffs—Death of one plaintiff pending suit—Abatement of suit.*

Where a suit concerning a public trust of a charitable or religious nature has been instituted by two persons having an interest in the trust with the consent of the Advocate-General, and one of the plaintiffs dies, the suit will abate. But it is open to any other member of the public similarly interested to obtain the consent of the Advocate-General and to apply to be brought on to the record as a co-plaintiff, and it would be the duty of the court to give a person wishing so to be made a party a reasonable opportunity of obtaining the consent of the Advocate-General.

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* First Appeal No. 290 of 1913, from a decree of E. C. Allen, District Judge of Mainpuri, dated the 18th of February, 1913.

THIS was a suit brought by two persons named Chhabile Ram and Bhagwan Das against one Durga Prasad under the provisions of section 92 of the Code of Civil Procedure, 1908. During the pendency of the suit Bhagwan Das died. One Mahant Kanhaiya Lal applied to the court to be brought on the record as a co-plaintiff in place of Bhagwan Das. Kanhaiya Lal was apparently not related to Bhagwan Das and was not his legal representative in the usual acceptation of that term. The court rejected Kanhaiya Lal's application and dismissed the suit as no longer maintainable. The plaintiffs thereupon appealed to the High Court.

Dr. *Surendra Nath Sen*, for the appellants.

Munshi *Lakshmi Narain*, for the respondents.

TUDBALL and RAFIQ, JJ.—This appeal arises out of a suit brought by two persons under the conditions mentioned in section 92 of the Code of Civil Procedure. These two persons were Chhabile Ram and Bhagwan Das. They obtained the sanction of the Legal Remembrancer and instituted the suit. The trustee against whom they sued was Babu Durga Prasad, the present respondent in this appeal. While the suit was pending Bhagwan Das died. One Mahant Kanhaiya Lal applied to the Court to have his name brought on the record as co-plaintiff in place of that of Bhagwan Das, claiming to be the heir and legal representative of the deceased. Apparently Kanhaiya Lal was not related in any way and could not have been deemed to be the heir and legal representative of Bhagwan Das in his personal capacity. The Court refused the application and dismissed the suit as it was no longer maintainable by one plaintiff. The judgement shows clearly that the question of Kanhaiya Lal's obtaining sanction from the Legal Remembrancer was before the court. That court was of opinion that the defect in the suit could not be cured by allowing Kanhaiya Lal time to apply for sanction. It therefore dismissed the suit. It is quite clear that a suit of this nature brought by two persons is brought by them in their representative capacity as members of the public interested in the trust. It has been held that section 92 is not mandatory but is permissive and directory. It seems to us also to be clear that, when a suit is brought by two or more persons under the conditions mentioned in section 92, for the continuance of the suit

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it is necessary that there should be at least two plaintiffs, i. e., two persons interested in the trust and holding the sanction of the Advocate-General or, in these provinces, of the Legal Remembrancer, in order to enable them to carry on the litigation. It is clear that if one representative dies it is open to another member of the public interested in the trust to come forward to take his place and thus to prevent the suit abating. It is also necessary that this other member of the public thus interested should obtain the sanction of the Advocate-General or the Legal Remembrancer. The suit being one which had been brought with sanction and it being a matter of a public trust, the lower court ought, in our opinion, to have given Kanhaiya Lal an opportunity, first, of obtaining sanction from the Legal Remembrancer and, secondly, of showing that he was a person interested in the trust, and on proof of these two qualifications the court ought in the interest of the public to have made Kanhaiya Lal a co-plaintiff in order to enable the suit to be carried on provided no good cause was shown by the other side against his being allowed to represent the public interest in the trust. The rulings quoted by the court below, viz., I. L. R., 26 All., page 162, and I. L. R., 36 Bom., page 168, are totally beyond the question and have no weight in the decision of the matter. We accordingly allow the appeal. We set aside the decree of the court below and we remand the case to the court below with direction to re-admit it on its original number and to proceed to hear and determine the same in view of the directions given above. The costs of this appeal will be costs in the cause and will abide the result.

Appeal decreed.

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*PRIVY COUNCIL.

LAHAR PURI (PLAINTIFF) v. PURAN NATH (DEFENDANT).

[On appeal from the High Court of Judicature at Allahabad.]

Hindu law—Endowment—Election of mahant of temple—Sadhak or disciple of deceased mahant—Election by a majority of the dasnam bhik (the ten classes of mendicants) assembled for purpose of such election—Separate election by faction of dasnam bhik.

An election of a mahant of a temple by the *dasnam bhik* (the ten classes of mendicants), in order to be a valid and effectual election must be made by a

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* *Present:*—Lord DUNEDIN, Sir GEORGE FARWELL, Sir JOHN EDGE, and Mr. AMEER ALI.

majority of the *dasnam bhik* assembled for that purpose. A separate election by a faction of the *dasnam bhik* is not a valid and effectual election.

In this case which related to the election of a mahant to a temple at Hardwar, called Akhara Baba Sarwan Nath, both the appellant (plaintiff) and respondent (defendant in possession of the math property) claimed to have been duly elected on the same day, the 24th of February, 1905, (being the *terwin*, the 13th day ceremony after the death of the late mahant) their Lordships of the Judicial Committee (affirming the decision of the High Court, which had reversed that of the Subordinate Judge), *held* that on the evidence, and under the circumstances of the case, the appellant, who claimed to be the *sadhak* (disciple) of the deceased mahant, had failed to prove that he had been duly elected mahant of the temple. On the other hand there was large body of evidence in support of the respondent (the *sadhak* of a former mahant) whose election and also the bhandara or feast usual on the occasion had taken place within the temple which was customary, whereas the election of, and the feast given by, the appellant took place outside the temple; that a majority of the persons present at the election of the respondent who were qualified to elect a mahant voted in favour of the respondent; that in point of numbers and influence the respondent received more support than the appellant; that the election of the respondent must have taken place before that of the appellant; and that there was no attempt on the part of the respondent to conceal (as the appellant alleged he had done) the arrangements he had made for the occasion. As it had not been shown that these points had been wrongly decided by the High Court, their Lordships dismissed the appeal

APPEAL No. 25 of 1914 from a judgement and decree (11th of March, 1912,) of the High Court at Allahabad, which reversed the judgement and decree (29th of November, 1909,) of the court of the Subordinate Judge of Saharanpur.

The questions for determination in this appeal were (1) what is the custom relating to the appointment of the mahant of a temple at Hardwar known as the Akhara of Baba Sarwan Nath, and (2) whether the appellant was appointed to be the mahant of the temple in accordance with that custom

The suit out of which the appeal arose was brought by the appellant for a declaration that he was the duly appointed successor of one Jhandu Nath, the mahant of a math at Hardwar, who died on the 12th of February, 1905, and for possession of the property of the math.

The plaintiff's case was that he was the duly appointed and only *sadhak* of Jhandu Nath. He alleged that, according to the custom and practice of the math, when a vacancy occurs in the office of mahant, representatives of the ten well-known classes of fakirs (Gir, Sagar, Sarsuti, Aran, Ashram, Parbat, Ban, Tirath,

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Bharti and Puri, the "*dasnam bhik*" as they are called) belonging to Hardwar and its vicinity, assemble on the 13th day after the death of the mahant, and elect and instal a *sadhak* of the deceased as his successor, provided that there is a *sadhak* fit for the office. The plaintiff further stated that the fakirs assembled in the temple on the 24th of February in order to elect and instal him as mahant, but when as a preliminary to being installed he went to bathe in the Ganges accompanied by the fakirs, the respondent (defendant) took advantage of his absence and shut the door of the temple; and that the fakirs, finding themselves unable to re-enter the temple, proceeded to conduct the necessary ceremonies in a building belonging to the Rani of Landaura, and duly elected the plaintiff as mahant of the math.

The case of the defendant, who claimed to be a *sadhak* of Tej Nath, the predecessor of Jhandu Nath in the mahantship, was that it was not necessary that a *sadhak* of the last mahant should be elected to succeed him; that a *sadhak* of any previous mahant of the math was eligible for election; that if none of the *sadhaks* was fit for the office, the fakirs of the "*dasnam bhik*" could appoint an outsider to be mahant; and that the power of electing a mahant was not confined to the fakirs of Hardwar and its vicinity. The defendant alleged that he was duly elected mahant by the fakirs in the temple on the 24th of February, 1905. He denied the story of the trick which the plaintiff alleged had been played upon him, and denied also that the plaintiff was a *sadhak* of Jhandu Nath or was duly elected to be mahant of the math.

The Subordinate Judge found that the plaintiff was duly appointed a *sadhak* by Jhandu Nath; that a *sadhak* of the deceased mahant had the first claim to succeed him, and could not be passed over unless he was found unfit for the office; that the plaintiff was duly appointed mahant in succession to Jhandu Nath; and that there was no real election of the defendant who had used his position and influence for the purpose of producing a number of false witnesses to say that he was elected in due form, and bringing into existence a "*mahantnama*" (a deed evidencing his appointment as mahant) in order to meet the "*mahantnama*" produced by the plaintiff which in the opinion of the Subordinate Judge evidenced a genuine and valid election.

From that decision the defendant appealed to the High Court, and his appeal was heard by SIR H. D. GRIFFIN and E. M. D. CHAMIER, JJ., who reversed the decree of the Subordinate Judge and dismissed the suit with costs. The High Court held that the evidence that the plaintiff had been duly appointed to be a *sadhak* of Jhandu Nath was unsatisfactory, and that he had not proved that *sadhaks* of the last mahant had any right "to be elected in preference to other *sadhaks* unless declared by the electors to be unfit." The High Court, on the evidence, came to the conclusion that "it is clear that both in point of numbers and of influence, the defendant received more support than the plaintiff did. It is also proved that the election of the defendant must have taken place before that of the plaintiff. In our opinion it has been proved that the defendant was elected by a large gathering of qualified persons, and that there was no attempt on the part of the defendant to conceal the plans which he made for the day on which the election took place. The election of the plaintiff was a hole-and-corner affair in comparison with that of the defendant, and seems to have been carried out hurriedly by a discontented minority."

On this appeal—

Sir H. Erle Richards K.C. and *J. M. Parikh* for the appellant contended that the custom alleged by him was established by the evidence, namely, that a disciple of the last mahant was the proper person to be appointed to be his successor, unless he was found to be unfit; that the appellant was shown to be the only disciple of Jhandu Nath, the deceased mahant; and that so far from being found unfit, he had in fact been elected as was held by both Courts. The question was whether his election was valid. The succession, it was submitted, was governed by the custom of the math: *Genda Puri* v. *Chhatar Puri* (1); and the custom set up by the appellant was in accordance with the general law of India in such cases as the present: *Gossain Dowlut Gir* v. *Bissessur Gir* (2); and *Ramji Das* v. *Lachhu Das* (3). The respondent, however, denied the existence, and the proof of any such custom as alleged by the appellant, and claimed that a majority of the

(1) (1886) I. L. R., 9 All., 1: L. R., 13 I. A., 100.

(2) (1873) 19 W. R., 215.

(3) (1902) 7 C. W. N., 145 (147).

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dasnam bhik had elected him, and that they had power to elect any one they desired; but such a custom would be entirely contrary to the principles of succession of one mahant to another in cases like the present; such principles being "based entirely upon fellowship and personal association with each other, and a stranger, though of the same order is excluded;" see *Khugginder Narain Chowdhry* v. *Sharupgir Oghorenath* (1). The case of *Sheo Prasad* v. *Arja Ram* (2) was also referred to, and it was submitted that the appellant had the preferential right to succeed to the mahantship, and the decision of the Subordinate Judge that the appellant had been duly, and in accordance with custom, elected mahant should not have been reversed by the High Court.

De Gruyther K.C. and *B. Dube* for the respondent contended that the appellant had not proved that the custom he set up was that which governed the succession to this particular math, which it was necessary for him to establish. *Greedharee Doss* v. *Nundkishore Doss* (3); *Muttu Ramalinga Setupati* v. *Perianayagam Pillai* (4); *Varma Valia* v. *Ravi Varmah Muthia* (5); and *Genda Puri* v. *Chhatar Puri* (6). As the appellant had not proved the custom of the math, he had made out no title to the mahantship: *Janoki Debi* v. *Gopal Acharjia* (7). Being a panchaiti math, the appointment of a mahant must be by election; *Ramanooj Doss* v. *Delraj Doss* (8); that is, however, not denied. The question is, was the appellant validly elected. An election must be a bona fide one. *Ramalingam Pillai* v. *Vaithialingam Pillai* (9). Can that be said of an election which was not held in the temple, the proper place for it, and was not made by a majority of the *dasnam bhik* there assembled on the 24th of February, 1905, but only by a small faction of those qualified to vote who alone supported the appellant's election. It was submitted that the election was not a valid one, and that the suit had been rightly dismissed by the High Court. The cases of

(1) (1878) I. L. R., 4 Calc., 543.

(2) (1907) I. L. R., 29 All., 663.

(3) (1867) 11 Moo. I. A., 405 (428).

(4) (1874) L. R., 1 I. A., 209.

(5) (1876) I. L. R., 1 Mad., 235 (251); L. R., 4 I. A., 76 (84).

(6) (1886) I. L. R., 9 All, 1: L. R., 13 I. A., 100.

(7) (1882) I. L. R., 9 Calc., 766: L. R., 10 I. A., 32.

(8) (1839) 6 Sel. Rep. (Ben.) 262 (268).

(9) (1893) I. L. R., 16 Mad., 490: L. R., 20 I. A., 150.

Gossami Sri Gridhariji v. *Ramanlalji Gossami* (1); and *Ramji Das* v. *Lachhu Das* (2) were also referred to.

Sir H. Erle Richards, K. C., replied.

1915 March 15th:—The judgement of their Lordships was delivered by Sir JOHN EDGE.

This is an appeal from a decree of the High Court of Judicature at Allahabad, dated the 11th of March, 1912, which reversed a decree of the Subordinate Judge of Saharanpur, dated the 29th of November, 1909, and dismissed the suit with costs. The suit was brought on the 12th of January, 1909, by Lahar Puri, who is the appellant, against Puran Nath who is the respondent. The dispute between the parties to this appeal relates to the title to the mahantship of a Hindu math, or temple, at Hardwar, known as the Akhara Baba Sarwan Nath, and to the property appertaining to the math.

The math was founded by one Baba Sarwan Nath, who was a Sunniyasi Rukhar Fakir and died in 1849. Since his death there have been several mahants of the math in succession. It does not appear that Baba Sarwan Nath, in founding the math, prescribed any rules or practice to be followed in the selection and appointment of the future mahants. Consequently, the selection and appointment of a person to be the mahant of the math on a vacancy occurring in the mahantship must depend on the custom or usage and the practices which have prevailed in the appointment of mahants of this math, and on that principle this suit has been fought in the First Court, in the High Court, and before this Board.

The dispute as to the title to the mahantship arose in February, 1905, on the death in that month of Jhandu Nath, who was the mahant of the math, and had succeeded Tej Nath in the mahantship in 1897. In this suit the plaintiff alleges that he was the only *sadhak* (disciple) of the deceased Mahant Jhandu Nath, and being the only *sadhak* of Mahant Jhandu Nath, he was the only one of the mendicant fraternity of the temple who was qualified for election to the mahantship; that he was duly elected mahant by the ten classes of mendicants (*dasnam bhik*) on the 24th of

(1) (1889) I. L. R., 17 Calc., 3: L. R., 16 I. A., 137.

(2) (1902) 7 C. W. N., 145 (147).

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February 1905; and that he was appointed with the usual ceremonies. On the other side the defendant denies that the plaintiff had ever been the *sadhak* of Mahant Jhandu Nath, or was qualified for election to the mahantship, or was elected mahant. The defendant's case is that it is not necessary that the *sadhak* of the last mahant should be elected as the mahant. He alleges in his written statement that:—

"The *sadhak* or a co-disciple, or the *sadhak* of a co-disciple of the deceased mahant is appointed a mahant, and failing these or in the event of none of these being a fit person, the mendicants of all the ten classes (*dasnam bhik*) have the power to make any fit person the *sadhak* of the *gaddi* and appoint him a mahant."

The defendant further alleges that he was a *sadhak* of Mahant Tej Nath, who preceded Mahant Jhandu Nath on the *gaddi* of the temple, and as such *sadhak* was qualified for election to the mahantship, and that he was duly elected and with the usual ceremonies was appointed mahant by all the ten classes of mendicants (*dasnam bhik*) on the 24th of February, 1905. It is not disputed that the defendant was a *sadhak* of Mahant Tej Nath. It is common ground that the time for the election of a successor in the mahantship of this temple is the *terhwin*, the thirteenth day ceremony, after the death of the deceased mahant, which in this case fell on the 24th of February, 1905. It is also common ground that on the death of a mahant of this temple the election of his successor takes place at Hardwar, and that the election and appointment of the new mahant is by the ten classes of mendicants (*dasnam bhik*) assembled at Hardwar for that purpose. From the evidence their Lordships infer that the usual place at which the *dasnam bhik* assemble for the purpose of electing a mahant of this temple, and at which they elect a mahant, is at the temple. Another common ground is that on the election and appointment of a mahant of this temple a *mahantinama* is drawn up and is witnessed by those who were present at the election, and is registered.

The defendant, who was the general attorney and storekeeper of the deceased mahant, is in possession of the temple and of the property appertaining to it. Consequently it is for the plaintiff to prove his right to the mahantship, which, if proved, would in the case of this temple, carry with it the right to the possession of the temple and of the property appertaining thereto. If the

plaintiff has failed to prove that he is the duly elected mahant of the math his suit must fail, and in that event it would be immaterial to consider whether the defendant is or is not the mahant of the math, or whether he has or has not any better title to the temple and the property which appertains to it than a title of mere possession.

Much evidence has been led by each side. The documentary evidence is not, in their Lordships' opinion, conclusive in favour of either side. The oral evidence is, as the High Court observed, extraordinarily conflicting, even for a case of this kind Some of the material witnesses, who, if their evidence was true, must have been in a position to contradict or explain much of the evidence of the other side as to the events of the 24th of February, 1905, were examined and were cross-examined at great length, but were allowed to leave the witness box without their attention having been directed to the case of the other side. As the case was treated in the court of the trial judge it was an important question whether there were on the 24th of February, 1905, two elections of a mahant by the *dasnam bhik*, or one election only, or no real election at all. As the learned Judges of the High Court observed in their judgement in the defendant's appeal before them:—

"The witnesses for the respondent (the plaintiff) say nothing about the election of the appellant (the defendant), and the witnesses for the appellant, with one or two exceptions, say nothing about the election of the respondent."

and yet it is alleged that there were two elections on the morning of the 24th of February, 1905, by the *dasnam bhik* then assembled at the temple.

The Subordinate Judge found as a fact that the plaintiff was the *sadhak* of Mahant Jhandu Nath. The learned Judges of the High Court, after reviewing the evidence bearing on that question, and not overlooking the fact that it was a strong point in favour of the view which the Subordinate Judge had taken that a number of fakirs who were unlikely to choose a complete outsider had joined in the so-called election of the plaintiff as mahant, were on the whole unable to say that the evidence that the plaintiff had been duly appointed a *sadhak* was satisfactory. As the plaintiff had failed to satisfy the Judges of the High Court that he had been a *sadhak* of Mahant Jhandu Nath, and as he had

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neither alleged nor proved that he was in any other way qualified for election as mahant of the math, they might have allowed the appeal and have dismissed the suit without going into the question as to whether he was or was not elected. However, they did not dispose of the appeal before them on that point; they decided the appeal on the question as to whether the plaintiff had or had not been duly elected the mahant. In the view which their Lordships take of this case it is not necessary for them to decide whether or not the plaintiff had been a *sadhak* of Mahant Jhandu Nath.

The evidence as to the so-called elections on the 24th of February, 1905, is most conflicting. Each party claims to have been elected mahant by the *dasnam bhik* on that day. That there were, in fact, two factions amongst the *dasnam bhik*—one faction desirous of electing the plaintiff as mahant, the other faction desirous of electing the defendant as mahant is on the evidence obvious. The Subordinate Judge found that it was satisfactorily proved that the plaintiff was duly elected mahant by the *dasnam bhik* on that day, and that the alleged election of the defendant as mahant was a fictitious transaction. The High Court found it proved that the defendant was elected on the 24th of February, 1905, by a large gathering of qualified persons and that the election of the plaintiff was:—

> "A hole-and-corner affair in comparison with that of the appellant (the defendant), and seems to have been carried out hurriedly by a discontented minority."

of the *dasnam bhik* which had assembled at the temple on the morning of the 24th of February, 1905.

There is evidence to support each of these contradictory findings. If their Lordships were to confine their attention to the evidence as to what took place on the 24th of February, 1905, it might be difficult to come to a conclusion as to the side on which the truth is to be found. The plaintiff's case is that he was elected at the temple that morning by the *dasnam bhik*, and that, having gone with his supporters to the Ganges to bathe before the completion of the ceremonies, they found on their return from bathing that the doors of the temple were closed, and they were obliged to complete the ceremonies at the *haweli* of the Rani of Landhaura, where he was installed, and that the *bhandhara*, the

customary feast on such occasions, took place at the Rani's *haweli*.

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The plaintiff represented that he had been deceived by the defendant, and had believed until he returned from bathing that the defendant was favourable to his election. He represented that before he went to bathe the defendant had at the temple handed to him the ceremonial robes to be used at his installation, and given him the *mahantinama* of Mahant Jhandu Nath as a precedent upon which his own *mahantinama* should be drawn up. The defendant's case was that he and he alone had been elected by the *dasnam bhik* at the temple on the morning of the 24th of February, 1905, and that the ceremonies for the completion of his appointment as mahant had taken place at the temple.

Mahant Jhandu Nath, being ill, went to Lahore and died there on the 12th of February, 1905. There is some evidence, which their Lordships see no reason to doubt, that when at Lahore Mahant Jhandu Nath nominated the defendant as a fit person to succeed him in the mahantship. It is not suggested that Mahant Jhandu Nath had any power to appoint anyone as his successor, but his nomination would probably have weight with the *dasnam bhik*. The plaintiff, even assuming for the moment that he was a *sadhak* of Mahant Jhandu Nath, had no experience in the management of the affairs of the math or of the property appertaining to the temple. On the other hand the defendant, who undoubtedly had been a *sadhak* of Mahant Tej Nath and a co-disciple of Mahant Jhandu Nath, had been for years the general attorney of Mahant Jhandu Nath and the storekeeper of the temple. On the death of Mahant Jhandu Nath the defendant was early in the field preparing to secure his own election as mahant in succession to Mahant Jhandu Nath. The defendant and some supporters of his executed an agreement on the 18th of February, 1905, by which they settled between them that the defendant should be the mahant and should be installed on the *gaddi* of Baba Sarwan Nath. The defendant before the 24th of February, 1905, took a step which must have been notorious as indicating that he claimed to succeed Mahant Jhandu Nath; he filed an application in the Revenue Court in which he prayed that his name should be entered in the revenue papers in re[illegible]

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of the property of the temple in place of that of the late Mahant Jhandu Nath. When the defendant was examined in this suit as to his application to the Revenue Court for mutation of names he, in answer to the pertinent question:—

"How did you file an application for mutation of names when you had not been elected a mahant?"

replied—

"We had settled the matter amongst ourselves."

In reply to the interrogative observation on that answer:—

"The *dasnam bhik* had not settled the question up to that time?"

the defendant said

"When Jhandu Nath was elected to the *gaddi* the *dasnam bhik* said that Puran Puri (the defendant) would be appointed mahant after Jhandu Nath; and on the *tija* day also the panches settled that Puran Puri would be appointed mahant."

It was the defendant who sent out the invitations to the mahants and other people to attend on the *terhwin*, thirteenth day ceremony, when a mahant should be elected. None of the invitations have been produced, but from some of the replies which have been put in evidence it may be inferred that the invitations were to attend for the election of the defendant as mahant. It was the defendent who made the preparations for the *bhandara*, the customary feast, which was to take place at the temple on the day of the election of the mahant. That *bhandara* was held at the temple, and it is not pretended that the plaintiff and his supporters took part in it. The *bhandara* in which the plaintiff and his supporters took part was held at the *haweli* of the Rani of Landhaura. The plaintiff had then no money, but after he had been placed on the *gaddi* at the Rani's *haweli* he borrowed some money from the Swami Shimboo Gir and sent two brahmans into the bazaar, who bought the things which were required for his *bhandara*.

According to some of the plaintiff's witnesses the defendant was present at the temple when it was settled by the *dasnam bhik* that the plaintiff had a right to the mahantship and should be appointed mahant, and did not object or claim that he, and not the plaintiff, should be elected mahant. Having regard to the facts to which their Lordships have referred, it is impossible to believe that the defendant was assenting to the election of the plaintiff. There is a large body of evidence in support of the

defendant's case that he was elected mahant on the morning of the 24th of February, 1905.

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The High Court has found that the majority of the persons present on the morning of the 24th of February who were qualified to elect a mahant of this temple were in favour of the defendant; that in point of numbers and of influence the defendant received more support than the plaintiff did; that the election of the defendant must have taken place before that of the plaintiff; and that there was no attempt on the part of the defendant to conceal the arrangements which he had made for the 24th of February, 1905. It has not been shown to their Lordships that the High Court came to a wrong conclusion on any one of these points. An election by *dasnam bhik* of a mahant to be a valid and effectual election must be by a majority of the *dasnam bhik* assembled for that purpose. A separate election by a faction of the *dasnam bhik* is not a valid and effectual election. Their Lordships have come to the conclusion that the plaintiff has failed to prove that he was elected a mahant.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of this appeal.

Appeal dismissed.

Solicitor for the appellant:—*Edw. Delgado.*

Solicitors for the respondent:—*Barrow, Rogers & Nevill.*

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Chamier and Mr. Justice Piggott.

1915 March, 8.

BADAN (JUDGEMENT-DEBTOR) v. MURARI LAL AND ANOTHER (DECREE-HOLDERS)*

Mortgage—Two mortgages executed by the same mortgagor—Mortgagor becoming by inheritance owner of decree for sale on prior mortgage—Effect of, on rights of puisne mortgagees.

Held that a mortgagor who had become by inheritance the owner of a decree against himself on a prior mortgage was not entitled to hold up such prior mortgage as a shield against the decree of a subsequent mortgagee

*Second Appeal No. 493 of 1914 from a decree of L. Johnston, District Judge of Meerut, dated the 11th of February, 1914, reversing a decree of Kalika Singh, Additional Subordinate Judge of Meerut, dated the 10th of May, 1913.

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from himself. *Otter* v. *Vaux* (1), *Platt* v. *Mendel* (2) and *Baju Chowdhury* v. *Chunni Lal* (3) referred to.

THE facts of this case were as follows :—

One Badan mortgaged his property first to one Umrao Singh and afterwards to one Bhup Singh. Umrao Singh sued on his mortgage without impleading Bhup Singh, the puisne mortgagee, and obtained a decree for sale, which he transferred to the mortgagor's brother Bahal. Subsequently Bhup Singh transferred his mortgagee rights to the present respondents who obtained a decree for sale subject to the prior mortgage. Bahal died leaving the mortgagor as his sole heir. The respondents applied for the execution of their decree, and claimed to be entitled to bring the property to sale free from the prior mortgage, on the ground, that when Bahal died and the benefit of the prior mortgage passed to the mortgagor, that mortgage merged in the mortgagor's proprietary right and was extinguished. The mortgagor on the other hand contended that no merger took place. The court of first instance allowed the mortgagor's objection. On appeal the lower appellate court reversed the decree. Thereupon the mortgagor appealed to the High Court.

Mr. *Nehal Chand*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* and Dr. *Surendro Nath Sen*, for the respondents.

CHAMIER and PIGGOTT, JJ.—The question for decision in this appeal is whether the respondents are entitled, as held by the lower appellate court, in execution of a decree on a mortgage to bring the property to sale free from a prior mortgage. The appellant mortgaged the property first to Umrao Singh and afterwards to Bhup Singh. Umrao Singh sued on his mortgage without impleading Bhup Singh and obtained a decree for sale which he transferred to the appellant's brother Bahal. Bhup Singh transferred his mortgage to the respondents who obtained a decree for sale subject to the prior mortgage. Bahal died leaving the appellant as his sole heir. The respondents have now applied for execution of their decree, and they claim to be entitled to bring the property to sale free from the prior mortgage, on the ground that, when Bahal died

(1) (1856) 6 D. M. and G., 638. (2) (1884) L. R., 27 Ch. D., 246.
(3) (1906) 11 C. W. N., 284.

and the benefit of the prior mortgage passed to the appellant, that mortgage merged in the appellant's proprietary right and was extinguished. The appellant on the other hand contends that no merger took place. The first court held with the appellant but the lower appellate court accepted the contention of the respondents. Hence this appeal.

Section 101 of the Transfer of Property Act was referred to in the course of the arguments, but that section appears to apply only to the converse case of the owner of an encumbrance becoming the absolute owner of the property, though it is not easy to see why the words "is or" were inserted in the section. There being no legislative provision on the question for decision, the case must be decided according to broad principles of equity and good conscience, with such assistance as may be afforded by reported decisions of the courts. We have not been referred to any case that is precisely in point, but there are several cases which bear more or less closely on the point now before us. The question whether an encumbrance acquired or paid off by the absolute owner of the property is to be considered extinguished or kept alive for his benefit is, according to a long line of authorities, generally one of intention. In the case of *Thorne* v. *Cann* (1) Lord MACNAGHTEN said :—" Nothing, I think, is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot." The decision in *Johnson* v. *Webster* (2), shows that the rule is the same where the owner of an estate inherits a charge thereon. In the absence of expressed intention to the contrary it will be presumed that when a person claiming to be absolute owner of property acquires or pays off a mortgage thereon, and there is no subsequent incumbrance, he intends to extinguish the mortgage, but where there is an incumbrance intermediate between the mortgage paid off or acquired and the

(1) (1895) L. R., A. C., 11. (2) (1854) 4 D. M. and G., 474.

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ownership of the property the presumption is the other way, see *Johnson* v. *Webster* (1). *Mohesh Lal* v. *Mohunt Bawan Das* (2), *Adams* v. *Angell,* (3), *Gokul Das* v. *Ram Bakhsh* (4). It would be very much to the advantage of the appellant to keep the first mortgage alive, and in various ways which need not be detailed he has shown that he wishes to keep it alive. The question is whether the rule stated above, which is founded on the clearest equity and has, as we have shown, been applied by their Lordships of the Privy Council to Indian cases, applies to the case before us in which both mortgages were made by the owner of the property, who however wishes to hold one up against the other. In England and also in India it has been held that if the owner of an estate creates and pays off a mortgage the mortgage merges in the owner's estate, and that an owner who has paid off a prior incumbrance cannot set it up against his own mortgage see *Otter* v. *Vaux* (5), the dictum of Chitty, J. in *Platt* v *Mendel* (6) and *Bhaju Chowdhury* v. *Chunni Lal* (7). Like the general rule, this exception to it seems to us to be founded on the plainest equity. Does the fact that the appellant inherited the prior mortgage furnish any ground for distinguishing the present case from the cases last referred to? We think not. Indeed we are inclined to think that the fact that the appellant acquired the rights of the prior mortgagee without having to pay for them makes the case somewhat stronger against him than it would have been if he had paid for them. It seems to us that it would be inequitable to allow the appellant to set up a mortgage which he himself created, but on which he has had to pay nothing, against a subsequent mortgage which he undertook personally to discharge. Acquisitions by a mortgagor enure as a rule for the benefit of his mortgagee, thereby increasing the value of his security, see *Raja Kishen Datt* v. *Raja Mumtaz Ali Khan* (8) and *Ajudhia Prasad* v. *Man Singh* (9). On the whole we are of opinion that the decision of the lower appellate court is correct. To avoid misapprehension we may add that it has not been

(1) (1854) 4 D. M. and G., 474.
(2) (1884) L. R., 10 I. A., 62.
(3) (1876) L. R., 5 Ch. D., 634.
(4) (1883) I. L. R., 10 Calc., 1035.
(5) (1856) 6 D. M. and G., 638.
(6) (1884) L. R., 27 Ch. D., 246.
(7) (1906) 11 C. W. N., 284.
(8) (1879) I. L. R., 5 Calc. 198 (210).
(9) (1902) I. L. R., 25 All., 46.

shown that the appellant's brother left any debts. The prior mortgage would of course be liable in the hands of the appellants for the debts of his brother. There could be no question of merger to the prejudice of the brother's creditors.

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The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Chamier and Mr. Justice Piggott

MAHARAJ NARAIN SHEOPURI AND ANOTHER (DEFENDANTS) v. SHASHI SHEKHARESHWAR ROY (PLAINTIFF)*.

1915 *March*, 16.

Civil Procedure Code (1908), section 9—Act No I of 1877 (Specific Relief Act), section 42—Suit for declaration that the plaintiff is the Honorary Secretary of an association—Suit maintainable—Jurisdiction.

Although the fact that an office is of a purely honorary nature may not by itself be sufficient to render a suit respecting such office unmaintainable in a Civil Court, yet where a plaintiff complained of his eviction from the office of secretary to a society, which was an honorary office and his continuance wherein depended upon rules which the society had power to alter at any moment, it was *held* that a Civil Court ought not to entertain a suit for a declaration that the plaintiff had been illegally deprived of such office, inasmuch as such Court could not give any decree in his favour which might not be immediately rendered nugatory by the action of the society. *Chunnu Datt Vyas* v. *Babu Nandan* (1) referred to.

THE facts of this case were as follows:—

The plaintiff was the Chief Secretary of the Pratinidhi Sabha (Board of Representatives) of a registered Association called the Sri Bharat Dharma Mahamandal. His office was purely honorary. He brought the present suit for a declaration that a certain meeting of the Association had been convened in a manner contrary to the rules and constitution of the Association and that the resolution passed by the meeting removing him from office was null and void. During the pendency of the suit the Association appointed another Chief Secretary in his stead. The court of first instance held that the suit did not come within the provisions of section 9 of the Civil Procedure Code and was not cognizable by a Civil Court. In appeal before the District Judge the defendants raised a further objection that the suit was barred by section 42 of the Specific Relief Act inasmuch as the plaintiff had not claimed any injunction against the newly appointed Chief Secretary who had been added

* First Appeal No. 135 of 1914 from an order of B. J. Dalal, District Judge of Benares, dated the 29th of June, 1914

(1) (1910) I. L. R. 32 All., 527.

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as a defendant. The District Judge reversed the decision of the first court and remanded the suit with directions to give the plaintiff an opportunity to amend the plaint by the addition of a prayer for injunction. Against this order of remand the defendants appealed to the High Court.

Babu *Sarat Chandra Chaudhri*, (with him Dr. *Satish Chandra Banerji*), for the appellants.

The suit is not cognizable by a Civil Court because the office which the plaintiff was holding was an honorary one carrying no emoluments or pecuniary gain with it. In order to determine whether a suit relating to an office comes within the jurisdiction of a Civil Court the ordinary test is "whether there is any specific pecuniary benefit attached to the office claimable in the nature of wages, however small that benefit may be." *Srinivasa* v. *Tiruvengada* (1). This principle is approved of in *Chunnu Datt Vyas* v. *Babu Nandan* (2). Even if the pecuniary test be not conclusive, yet the plaintiff has got to show that some civil right to which he is entitled has been infringed by the act of the defendant. In the present instance the plaintiff's office is not in the nature of a trust. It simply confers a mere dignity on him, the loss of which does not give a cause of action. The plaintiff's position is that of an unpaid servant of a religious and charitable Association which may or may not choose to retain him. The plaintiff cannot complain if all the members of that body are not satisfied with him. The plaintiff has, in fact, been superseded by another Secretary, and the decree of the court will be *brutum fulmen* because an Association which is guided by its own rules liable to be changed at any moment cannot be bound down to accept, against its wishes, a person whom it has dismissed from an honorary office. The case of *Mamat Ram Bayan* v. *Bapu Ram Atai* (3) relied on by the District Judge is distinguishable because it was found there that the office was in the nature of a trust attached to a particular temple. In this case the office is a purely personal one. The *ratio* of the ruling in *Tholappala Charlu* v. *Venkata Charlu* (4) is in my favour. Lastly, a claim for declaration or injunction is within the discretion of the court to grant. A court is

(1) (1888) I. L. R., 11 Mad., 450.
(2) (1910) I. L. R., 32 All., 527.
(3) (1887) I. L. R., 15 Calc., 159.
(4) (1890) I. L. R., 19 Mad., 62.

always slow to grant such relief when it is called upon to investigate the propriety or otherwise of the rules and constitution of a private body like the Bharat Dharma Mahamandal. Consequently on all grounds the suit should fail.

Mr. *A. E. Ryves* (with him Babu *Harendra Krishna Mukerji,* and Babu *Amullya Charan Mittra*), for the respondent:—

The contention for the appellants that the suit is not cognizable by a Civil Court on the ground that no pecuniary gain accrues to the plaintiff from his office is not warranted by the plain language of section 9 of the Civil Procedure Code. What that section contemplates is, that the suit must relate *to an office* whatever may be its nature. The Vice Chancellor of the University of Allahabad holds an office which is as much honorary as that of the plaintiff in the present case, and it could hardly be contended that if the Vice Chancellor was removed from his position as such in contravention of the constitutional rules of the University, no suit could be maintained by him for restoration to that office. The leading case on the subject of such suits is that of *Mamat Ram Bayan* v. *Bapu Ram Atai* (1) which goes the whole length of holding that an office for the loss of which a suit will lie may not only be honorary but may even entail some expenditure on the part of the incumbent. The test as laid down in the Madras cases cited by the appellants is opposed to authority and principle and does not form the basis of the decision in the case of *Chunnu Datt Vyas* v. *Babu Nandan* (2). Read as a whole that case shows that the ground for the dismissal of the suit was the plaintiff's tender age and his incapacity for organizing and managing the pageants in respect of which he asserted his own right. The particular observations in that case to which the appellants have referred have no higher force than that of *obiter dicta*. No doubt, a relief for declaration or injunction is discretionary with the court to grant or refuse; but in a case like the present where the respondent's legal status has been invaded he is entitled to seek the protection of the court, and it is out of place at this stage to enter into the question how far its decree will avail the respondent.

(1) (1887) I. L. R., 15 Calc., 159. (2) (1910) I. L. R., 32 All., 527.

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MAHARAJ NARAIN SHEOPURI v. SHASHI SHEKHARESHWAR ROY.

Babu *Sarat Chandra Chaudhri* was not heard in reply.

PIGGOTT, J.:—In this case the plaintiff, Raja Sashi Sekhareshwar Roy, Rai Bahadur, describes himself as the Chief Secretary of the Board of Trustees, otherwise known as the Pratinidhi Sabha, of an Association known as the Sri Bharat Dharma Mahamandal, registered under Act XXI of 1860. He complains in effect that the two defendants, who are members of the same Association, are seeking to remove him from the post of Chief Secretary and have endeavoured to do so by measures contrary to the rules of the Association itself. He asks for a declaration that a circular convening a meeting to be held on 12th of May, 1912, was "invalid and inoperative under the rules or constitution of the said Sri Bharat Dharma Mahamandal," and that the meeting held in consequence of this notice and the resolutions passed at the said meeting are "null and void."

The first court held that the dispute was not one cognizable by the Civil Courts and that the plaintiff had no *locus standi* under section 42 of the Specific Relief Act to ask for a declaration; it dismissed the suit accordingly. The learned District Judge in appeal has reversed this finding and remanded the suit for trial on the merits. The appeal before us is by the defendants against this order of remand.

I think the first court was substantially right and that the learned District Judge has taken too narrow a view of the question in issue. In order to succeed the plaintiff has to satisfy the court both that the suit is one concerning the right to an office, within the meaning of section 9 of the Civil Procedure Code, and also that what he is enforcing in this suit is his right to a certain "legal character" within the meaning of section 42 of the Specific Relief Act (No. I of 1877). Of the reported cases to which we were referred in argument, the one most nearly in point is that of *Chunnu Datt Vyas* v. *Babu Nandan* (1). It may be that the fact that a plaintiff is claiming some position to which no remuneration attaches is not always decisive; but in the present case I think it is so. If the plaintiff was the paid Secretary of the Board of Trustees he would have certain rights founded upon contract, and he could claim the enforcement of the rules of the Society or Association as they

(1) (1910) I. L. R., 32 All., 527.

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existed at the time of his appointment, in so far as those rules formed part of the essential conditions subject to which he accepted his employment. As a matter of fact the plaintiff's services are voluntary and gratuitous ; there is no question of any contract between him and the Board of Trustees. The latter have a perfect right to entrust the duties of Honorary Secretary to their body to such person or persons, willing to undertake the same, as they may from time to time approve. It would be idle for the Civil Courts to enter upon an investigation of the rules of this particular Association governing the appointment of honorary secretaries when those rules themselves could be altered at any moment by the Board of Trustees, and there is no enforceable contract in existence which could bind the Trustees to abide by the rules in existence at the time of the plaintiff's appointment in their subsequent dealings with him. That this is no merely conjectural argument is sufficiently shown by the fact that, at the hearing of this appeal, we have been handed two different sets of rules, the appellant putting in a book dated the " January 1911 " and the respondents one of 1913. The point really lies in a nutshell. The plaintiff either does or does not possess the confidence and support of a majority of the Board of Trustees. In the former case no such machinations as are alleged in the plaint could prevent the said Board from continuing to use his services as their Honorary Secretary, in the latter case no decree which any Civil Court could pass on a suit like the present could prevent the Board of Trustees from dispensing with the plaintiff's services and employing some one else.

I would *set aside the order of the lower appellate court* and restore the decree of the court of first instance dismissing this suit.

CHAMIER, J.—I agree.

BY THE COURT.—The order and decree of the lower appellate court are set aside and the decree of the court of first instance dismissing the suit is restored. The defendants will get their costs in all courts.

Appeal decreed.

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MAHARAJ NARAIN SHEOPURI v. SHASHI SHEKHARESHWAR ROY.

Babu *Sarat Chandra Chaudhri* was not heard in reply.

PIGGOTT, J.:—In this case the plaintiff, Raja Sashi Sekhareshwar Roy, Rai Bahadur, describes himself as the Chief Secretary of the Board of Trustees, otherwise known as the Pratinidhi Sabha, of an Association known as the Sri Bharat Dharma Mahamandal, registered under Act XXI of 1860. He complains in effect that the two defendants, who are members of the same Association, are seeking to remove him from the post of Chief Secretary and have endeavoured to do so by measures contrary to the rules of the Association itself. He asks for a declaration that a circular convening a meeting to be held on 12th of May, 1912, was "invalid and inoperative under the rules or constitution of the said Sri Bharat Dharma Mahamandal," and that the meeting held in consequence of this notice and the resolutions passed at the said meeting are "null and void."

The first court held that the dispute was not one cognizable by the Civil Courts and that the plaintiff had no *locus standi* under section 42 of the Specific Relief Act to ask for a declaration; it dismissed the suit accordingly. The learned District Judge in appeal has reversed this finding and remanded the suit for trial on the merits. The appeal before us is by the defendants against this order of remand.

I think the first court was substantially right and that the learned District Judge has taken too narrow a view of the question in issue. In order to succeed the plaintiff has to satisfy the court both that the suit is one concerning the right to an office, within the meaning of section 9 of the Civil Procedure Code, and also that what he is enforcing in this suit is his right to a certain "legal character" within the meaning of section 42 of the Specific Relief Act (No. I of 1877). Of the reported cases to which we were referred in argument, the one most nearly in point is that of *Chunnu Datt Vyas* v. *Babu Nandan* (1). It may be that the fact that a plaintiff is claiming some position to which no remuneration attaches is not always decisive; but in the present case I think it is so. If the plaintiff was the paid Secretary of the Board of Trustees he would have certain rights founded upon contract, and he could claim the enforcement of the rules of the Society or Association as they

(1) (1910) I. L. R., 32 All., 527.

existed at the time of his appointment, in so far as those rules formed part of the essential conditions subject to which he accepted his employment. As a matter of fact the plaintiff's services are voluntary and gratuitous ; there is no question of any contract between him and the Board of Trustees. The latter have a perfect right to entrust the duties of Honorary Secretary to their body to such person or persons, willing to undertake the same, as they may from time to time approve. It would be idle for the Civil Courts to enter upon an investigation of the rules of this particular Association governing the appointment of honorary secretaries when those rules themselves could be altered at any moment by the Board of Trustees, and there is no enforceable contract in existence which could bind the Trustees to abide by the rules in existence at the time of the plaintiff's appointment in their subsequent dealings with him. That this is no merely conjectural argument is sufficiently shown by the fact that, at the hearing of this appeal, we have been handed two different sets of rules, the appellant putting in a book dated the " January 1911 " and the respondents one of 1913. The point really lies in a nutshell. The plaintiff either does or does not possess the confidence and support of a majority of the Board of Trustees. In the former case no such machinations as are alleged in the plaint could prevent the said Board from continuing to use his services as their Honorary Secretary, in the latter case no decree which any Civil Court could pass on a suit like the present could prevent the Board of Trustees from dispensing with the plaintiff's services and employing some one else.

I would set aside the order of the lower appellate court and restore the decree of the court of first instance dismissing this suit.

CHAMIER, J.—I agree.

BY THE COURT.—The order and decree of the lower appellate court are set aside and the decree of the court of first instance dismissing the suit is restored. The defendants will get their costs in all courts.

Appeal decreed.

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March, 9.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

PARSOTAM RAO TANTIA AND ANOTHER (DEFENDANTS) *v.* RADHA BAI AND ANOTHER (PLAINTIFFS).*

Act No. IX of 1908 (Indian Limitation Act,) Schedule I, Articles 62, 120—Separate Hindu family—Property managed by one member—Receipt of money by that member—Suit for partition.

Three brothers who had been living with their father as a joint Hindu family obtained under the will of their father, in whose hands it was separate property, a considerable amount of movable and immovable property. The property so bequeathed was divided by the will into three lots; but the legatees still continued to live as a joint Hindu family; and the property of all was managed for a series of years by one member of the family acting as if he were the *karta* of a joint Hindu family.

Held on suit by the widow of one of the members of the family to recover from the manager her deceased husband's share of money received by the defendant as manager, but owned by all the three members of the family in equal shares, that the suit was not a suit for "money had and received," but was one to which article 120 of the first schedule to the Indian Limitation Act applied.

THIS was a suit for partition of immovable property and recovery of a share in a specific amount of money received by the defendant while acting as manager of property belonging to himself and his brothers. The money was received by the defendant in and before June, 1905, but the suit was brought in 1909. The defence, *inter alia*, was that the suit in respect of that item was barred by limitation. The court below decreed the suit. The defendants appealed to the High Court.

Dr. *Satish Chandra Banerji*, for the appellants:—

The first point for decision is whether the suit is maintainable in view of the provisions of sections 11 and 47 of the Code of Civil Procedure. In *Parsotam Rao* v. *Radha Bai*, (1) authorities are collected in support of the proposition that a decree for partition is one in favour of each share-holder or set of share-holders having a distinct share. The plaintiff's remedy therefore is to execute the decree made in Janki Bai's suit and the present suit is wholly misconceived. Radha Bai was a party to that suit and she ought to have seen that the decree was properly drawn up. The next question is one of limitation. It is *res judicata* between the

* First Appeal No. 269 of 1913, from a decree of Murari Lal, Subordinate Judge of Cawnpore, dated the 23rd of June, 1913.

(1) (1910) I. L. R., 32 All., 469.

parties that they never had a joint title to any property. Their shares were all defined and separate. Consequently if any monies came into the hands of one of them, the three brothers would each be entitled to one-third of the amount and the actual recipient would be holding the same to the use of the other brothers to the extent of their shares. Article 62, Schedule I, of the Limitation Act therefore applies to the case; *Vaidyanatha Aiyar* v. *Aiyasamy Aiyar* (1), *Banoo Tewari* v. *Doona Tewari* (2) and *Thakur Prasad* v. *Partab* (3). The lower court is entirely wrong in treating this family as joint for the purpose of limitation and as separate for all other purposes. Even if the appellant be treated as the agent of the plaintiff's husband because he was actually managing the property during the life-time of the latter, the article applicable would be 89 and not 120 and the plaintiff's husband having died in February, 1905, the agency must be deemed to have terminated on that date under section 201 of the Contract Act. The defendant repudiated the plaintiff's title after her husband's death and was never her agent. The suit is not one purely for partition, but it is to recover specific items of property including movables and sums of money specifically mentioned in the plaint.

The Hon'ble Pandit *Moti Lal Nehru* (with him the Hon'ble Dr. *Sundar Lal*), for the respondent was called upon in regard to the question of limitation only. Unless article 62, or 89 is clearly shown to apply the only article applicable would be article 120. Neither article 62 nor article 89, has any application to this case. The money claimed was not received for the use of the plaintiff who claimed as the representative of her deceased husband. Article 62 therefore does not apply; *Guru Das* v. *Ram Narain* (4) and *Chand Mal* v. *Angan Lal* (5). Article 89 would have applied if the suit had been instituted by the plaintiff's husband. It has no application to a suit between the representative of the principal and the agent; *Bindraban Behari* v. *Jamuna Kunwar* (6). On the pleadings however, no question arises either under article 62 or article 89. Though there was a separation of interest between the members

(1) (1909) I. L. R., 32 Mad., 191.
(2) (1896) I. L. R., 24 Calc., 309.
(3) (1883) I. L. R., 6 All., 442.
(4) (1884) I. L. R., 10 Calc., 860.
(5) (1891) I. L. R., 13 All., 368.
(6) (1902) I. L. R., 25 All., 55.

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of the joint Hindu family no actual partition by metes and bound was made and the brothers remained tenants in common of the whole property. This suit in substance is a suit for actual partition of the family property into definite shares. The plaintiff could not claim a specific item, and if she did she would be met with the defence that on a general account there was nothing due to the plaintiff. The case directly in point is *Ganesh Dutt Thakoor* v. *Jewach Thakooruin* (1), where the constitution of the family was exactly similar and the suit was brought for movables and immovables long after three years from the date of separation.

Dr. *Satish Chandra Banarji* was heard in reply.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit which related to property which at one time belonged to a man named Nana Narayan Rao. We do not for the moment specify the exact nature of the suit inasmuch as our decision upon a law point raised by the appellants depends to some extent upon the view we take of the nature of the suit. Nana Narayan Rao made a will in which he divided up his property between his three sons Ram Chander Rao, Vasudeva Rao and the defendant Parsotam Rao Tantia. Whilst dividing up the property he urged his family to continue to live together in an amicable and friendly way. There has been a good deal of litigation between the members of this family. In the first place a suit was brought by Ram Chander Rao, which was continued after his death in the name of his widow Janki Bai. Partition of the family property, or so much of it as had not already been divided by the will was claimed. Madho Rao and Parsotam Rao were defendants to that suit. It was pleaded by way of defence that the family constituted a joint Hindu family and that Musammat Janki as the widow of Ram Chander had no right to anything save maintenance. It was decided that the family was separate. Again Parsotam Rao brought a suit against Radha Bai, the present plaintiff, widow of Madho Rao, after the death of the latter for a declaration that the family was joint and that the widow Radha Bai had no interest. It was again decided that the family was separate. In the present suit the defendant Parsotam Rao pleads once more that the family is joint. In our opinion on the evidence and also as the result of

(1) (1903) I. L. R., 31 Calc., 262.

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the previous litigation, we entirely agree with the decision of the court below that Ram Chander Rao, Vasudeva Rao and Parsotam Rao, the three sons of Nana Narayan Rao, did not constitute a joint Hindu family according to Hindu Law, in that they had specific shares in the property. Nevertheless while the family was in law separate, in many respects it differed very little from a joint Hindu family. So long as the three brothers lived they appear to have been on friendly terms, and it was only shortly before the death of Ram Chander that he brought a suit for partition. The court below has found, and we entirely agree with its finding, that the greater part, if not the whole of the property, was managed by one member of the family, who occupied the position of a manager. The family nevertheless were separate because notwithstanding the mode of enjoyment and management they were entitled to the property in specific shares. When the present suit was instituted there had already been a considerable amount of litigation and the courts had held that the family was not joint, and in bringing her present suit the plaintiff has claimed *to be put into possession of a third of specific portions of the* property. Amongst the items of property claimed was the sum of Rs. 69,790-8-8. This claim was in respect of certain debentures in the Cawnpore-Achnera State Railway. It appears that the defendant Parsotam Rao had invested the joint funds in debentures in this railway. In course of time Government paid off the debentures at a substantial premium and the money was received by the defendant. The court below decided in the first place that the family was separate. It has given the plaintiff a decree for partition of a portion of the immovable property and also for the sum of Rs. 69,790-8-8 mentioned above. It has made also a decree in respect of other items to which it is unnecessary specially to refer at present. Agreeing as we do with the court below the plaintiff was clearly entitled to partition, and in this respect we have no hesitation in saying that the decree of the court below ought to be affirmed.

The appellants have contended very strongly that the court below ought not to have made a decree in the plaintiff's favour for the sum of Rs. 69,790-8-8 on the ground that her claim in that respect was barred by limitation. The money was paid ... to

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the defendant on or before June, 1908, and the present suit was not instituted until the 2nd of April, 1912, that is to say, more than three years after the money was received by the defendant. The appellants accordingly contend that the plaintiff's claim in respect of the item was a claim for "money had and received to the use of the plaintiff" within the meaning of article 62 of Schedule I to the Limitation Act. The way in which the plaintiff claimed this sum lends some colour to this contention, and had the present suit been a suit simply to recover this sum of money upon the allegation that the plaintiff being entitled to one-third of the debentures, and that all the redemption money had been paid to Parsotam as the person in whose name the debentures stood we might have been inclined to agree with the contention of the defendant that the claim came within the purview of article 62, and that the suit ought to have been brought within three years. Reading, however, the plaint as a whole, and having regard to the nature of the evidence and the defence, we think that the suit was in *reality* a suit for partition of the movable and immovable property which had been held by the three brothers and in which the plaintiff's husband had a third share. We have already pointed out that the property was managed by one member of the family. He appears to have received the rents and profits of the immovable property and to have invested and dealt with their money making investments in the ordinary course of business. When he received the money from Government in redemption of the debentures, he still received it in his capacity of manager. When we speak of a manager we do not mean the managing member of a joint Hindu family, but the individual to whom this particular family entrusted the management of their affairs. In this view we think that the suit was a suit governed by article 120, which provides a period of six years limitation for all suits not specifically provided for by the other articles in the schedule.

There was one other item to which Dr. *Banerji* specifically called our attention, namely, the *dera* (or collection house) in this village Lalpur. Dr. *Banerji* contends on behalf of his clients that while the village of Lalpur was specifically bequeathed to the plaintiff's husband, nevertheless as collections generally of several of the villages were made at this house, it must be regarded as

joint property and should have been partitioned. The learned Subordinate Judge considers that the provisions of the will ought to-be given effect to, which specifically gave the village of Lalpur to the plaintiff and that this house ought to be regarded as an appurtenant of that village. We see no reason to differ from the view taken by the learned Subordinate Judge. On full consideration of the entire case, we think the decree of the court below ought to be affirmed in its entirety. We accordingly dismiss the appeal with costs.

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Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Chamier and Mr. Justice Piggott

SAHADEO GIR (PETITIONER) *v.* DEO DUTT MISIR AND OTHERS (OPPOSITE PARTIES) *

1915 *March, 9.*

Civil Procedure Code (1908), *section* 152—*Refusal of Court to correct an accidental mistake in the drawing up of a decree—Revision—Jurisdiction.*

In a suit for sale on foot of a mortgage one of the defendants pleaded a prior mortgage. An issue was expressly struck on the point and was found in favour of the prior mortgagee. The operative portion of the judgement directed that a decree for sale should be prepared in accordance with the provisions of Order XXXIV, rule 4, of the Code of Civil Procedure; but the decree which was drawn up was one for sale of the property in suit, without any reference to the prior mortgage. The prior mortgagee presented an application under section 152 of the Code of Civil Procedure to the court which passed the decree to have it amended. *Held* that the prior mortgagee, whether or not he had preferred an appeal from the decree, was entitled, with reference to section 152, to have it amended, and the court in refusing to amend had failed to exercise a jurisdiction vested in it by law.

THE facts of this case were as follows :—

In a suit for sale upon a mortgage one of the defendants pleaded a prior encumbrance. An issue was framed on this plea and the court found that he had priority. Neither the judgement nor the decree, however, made any express provision for securing the prior right. The preliminary decree was passed on the 18th of February, 1911, and on the 1st of March 1913, the said defendant applied for correction thereof. That application was rejected on the 2nd of April 1913, on the ground that the decree was not at variance with the judgement. A decree absolute was passed on

* Civil Revision No. 114 of 1914.

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the 2nd of August, 1913. On the 21st of February, 1914, the defendant aforesaid applied under section 152 of the Civil Procedure Code for correction of the judgement and the decree by the insertion of the words "subject to the prior encumbrance, &c." after the words "by sale of the hypothecated property" in the judgement and the decree. This application being rejected the applicant came in revision to the High Court.

Babu *Sital Prasad Ghose* (with Babu *Jogindra Nath Chaudhri*), for the applicant.

It was distinctly found that the applicant had priority; the question had been specifically raised and decided. The omission to give practical effect to the priority was purely accidental. It was a mere oversight. Such an error comes within the scope of section 152, of the Civil Procedure Code and the court has inherent jurisdiction to correct such mistakes made by it in its judgement. It was the plain intention of the court to give effect to the prior right. The lower court has failed to exercise a jurisdiction vested in it by law and the case is a fit one for revision. *Sheo Balak* v. *Sukhdei* (1) and *Ashik Husain* v. *Mahdi Hasan* (2).

The Hon'ble Mr. *Abdul Raoof*, for the opposite party:—

This is not a case of an accidental slip or omission within the meaning of section 152. Upon the findings arrived at by the court it could have done one of two things. It could either have ordered the plaintiffs to redeem the prior mortgage of the applicant, or have ordered the sale subject to the prior encumbrance. It is not certain which course the court intended to adopt, and it cannot be said that the proposed correction represents the intention of the court. The form of decree (No. 8 of Appendix D of the Civil Procedure Code prescribed for a suit such as the one out of which the present application has arisen provides for redemption of the prior mortgage and not for sale subject to it; and there would be no justification for assuming that the court did not intend to draw up the decree consistently with the form prescribed. The applicant had another remedy open to him, namely, by way of appeal against the decree. Upon these considerations no case for section 152 or for interference in revision has been made out. The lower court has not refused to exercise

(1) (1914) 12 A. L. J., 185. (2) (1910) 13 Oudh cases, 114.

jurisdiction vested in it by law. It entertained the application, but was of opinion that section 152 could not help the applicant for the reasons given by it.

Babu *Sital Prasad Ghosh*, replied.

CHAMIER and PIGGOTT, JJ.—This is an application in revision brought under peculiar circumstances. The petitioner was a prior mortgagee. He had brought a suit against the mortgagor and the subsequent mortgagees upon his mortgage and had obtained a decree. Later on, the subsequent mortgagees brought a suit impleading the mortgagor and the present petitioner, and asked for a decree for sale. The petitioner pleaded his prior mortgage. An issue was expressly struck on the point and was found in the petitioner's favour. The operative portion of the judgement directed that a decree for sale should be prepared in accordance with the provisions of order XXXIV, rule 4, of the Civil Procedure Code, allowing six months for payment. In the absence of any express direction in the judgement that this decree was to be for sale of the property in suit subject to the petitioner's prior mortgage, no order to that effect was embodied in the decree. The decree passed was, therefore, one for sale of the property as it stood, without reference to the petitioner's prior mortgage. That decree was not appealed against, and to this extent the petitioner may have been guilty of laches. When, however, it came to the petitioner's knowledge that the opposite party was seeking to execute that decree as it stood, he went to the court which passed the same and sought to obtain its amendment. The application with which we are concerned was one presented under section 152 of the Civil Procedure Code. The court below refused to go into the matter on the merits. It held that the case was not one to which the provisions of section 152 aforesaid applied. We are unable to concur in the reasoning of the learned Judge of the court below. In our opinion, this was a clear case of an error arising from an accidental slip or omission. The court should have been prepared to correct that error, either of its own motion or on the application of any of the parties. There has been a refusal to exercise what in this case was a necessary jurisdiction, and this refusal is based on a misunderstanding of the powers conferred on the court below by the section

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aforesaid. We accept this application, and direct that the judgement be amended by the insertion of the express words directing the sale of the property in suit subject to the prior mortgage of this petitioner, and that consequential amendments be made in the preliminary decree for sale, as also in the decree absolute. As we think that the petitioner might have been more watchful over his own interest and should have taken action earlier than he did, we direct that he do bear the costs of the opposite side in the present proceedings both here and in the court below.

Application granted.

Before Mr. Justice Chamier and Mr. Justice Piggott.

1915 March, 10.

AFZAL BEGAM (DEFENDANT) v. AKBARI KHANUM AND OTHERS (PLAINTIFFS).*

Civil Procedure Code (1908), order XXIII, rule 1—Appellate court, powers of—Withdrawal of suit.

Held that an appellate court can, under order XXIII, rule 1, of the Code of Civil Procedure (1908), give a plaintiff whose suit has been dismissed by the court of first instance permission to withdraw his suit and give him leave to institute a fresh one. *Ganga Ram* v. *Dala Ram* (1) followed. *Choragudi Chinna Kolayya* v. *Raja Varada Raja Appa Row* (2) and *Eknath* v. *Ranoji* (3) dissented from.

THE facts of this case were as follows:—

The plaintiff brought a suit for partition of property which originally belonged to one Moti Begam. She omitted to implead certain heirs of her as defendants. The contesting defendants took an objection on this score and urged that the suit was not maintainable. No issue, however, was framed with respect to it and ultimately the court set apart the share of those heirs and gave the plaintiff a decree for her share in the remainder. The plaintiff appealed as regards the part of her claim which had been disallowed and the contesting defendants preferred a cross-objection again raising the plea that the suit was not maintainable for non-joinder of necesssary parties. Thereupon the plaintiff applied to the appellate court saying that as her suit might fail by reason of a formal defect, she prayed for permission to withdraw the suit with liberty to bring a fresh suit. The appellate court granted the application. The defendant filed a revision in the High Court from that order.

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*Civil Revision No. 157 of 1914.

(1) (1885) I. L. R., 8 All., 82. (2) (1914) 27 M. L. J., 244.

(3) (1911) I. L. R., 35 Bom., 261.

Dr. *S. M. Sulaiman*, for the applicant:— 1915

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The powers conferred by order XXIII, rule 1, clause (2) on courts to permit a plaintiff to withdraw a suit with liberty to institute a fresh suit are exercisable only so long as the suit has not proceeded to a decree. It is beyond the jurisdiction of an appellate court to grant such permission after the defendant has obtained a decree wholly or partly in his favour. The words of order XXIII, rule 1, as they stand, refer only to original suits which have not yet been disposed of. So far as the withdrawal of a suit is concerned, as distinguished from the withdrawal only of the appeal, none of the clauses of that rule can apply to an appellate court. For, if the rule can so apply at all the whole rule must apply and not only a portion. Now, clause (1) cannot apply because a plaintiff cannot abandon his suit after once a decree has been passed; thereafter the rights of the parties are merged in the decree. And if clause (1) cannot apply then clause (2) cannot, for it only gives power to the court to give liberty to bring a fresh suit in a case where the plaintiff can withdraw or abandon his claim. *Choragudi China Kotayya* v. *Raja Varada Raja Appa Row* (1) where the various clauses of the rule have been exhaustively analysed and discussed. *Ghazanfar Husain* v. *Ram Ratan Lal* (2) and *Eknath* v. *Ranoji* (3). The ruling in *Ganga Ram* v. *Data Ram* (4) is against the defendant. But that case was decided under section 373 of the old Civil Procedure Code; the language of that section has been altered and re-cast by the present rule. There are other reported cases in which an appellate court has permitted the plaintiff to withdraw his suit with liberty to bring a fresh suit, but there the point was not directly taken or decided The next question is, assuming that an appellate court has power to permit the plaintiff-appellant to withdraw his suit, whether in the present case the court has rightly exercised that power. The question whether or not there were sufficient grounds in law to justify the action of the court in permitting the withdrawal of the suit with liberty to bring a fresh suit is one on which the High Court can interfere in revision,

(1) (1914) 27 M. L. J., 244.
(2) (1913) 20 I. C., 17.
(3) (1911) I. L. R., 35 Bom., 261.
(4) (1885) I. L. R., 8 All., 82.

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Khadim Ali, who was dead, were not impleaded. In her written statement the first defendant to the suit distinctly pleaded that as Khadim Ali's heirs were not parties to the suit, the suit could not proceed. This plea appears to have escaped the attention of the Subordinate Judge, when he was fixing issues, with the result that no specific issue was fixed regarding it. But at the time of argument, the Subordinate Judge was asked to decide, behind the back of Khadim Ali's heirs, that they had no right to the estate. He declined to do this, but set apart what he considered to be Khadim Ali's share, and gave the plaintiff a decree for partition of her share in the remainder of the property. The plaintiff appealed, contending that her entire claim should have been decreed. The first defendant filed cross-objections, one of which was that all the necessary parties had not been impleaded, and that the suit should have been dismissed. Thereupon the plaintiff presented a petition to the District Judge saying that it was by mistake that she had failed to implead the heirs of Khadim Ali, that the first defendant had pleaded that the suit could not proceed in their absence and had reiterated this objection in her memorandum of objections in the appellate court, and that she was afraid that her suit and appeal would be dismissed on this ground, she therefore prayed for permission to withdraw from the suit and bring another suit. The District Judge, rightly or wrongly, held that as the suit was one for partition, non-joinder of necessary parties might result in its being dismissed, and he pointed out that a complete partition of the property could not be effected in the absence of Khadim Ali's heirs, and he came to the conclusion that a fair ground had been made out for allowing the plaintiff to withdraw from the suit. It may be that we should not have taken the same view as the District Judge took of the non-joinder of Khadim Ali's heirs. It might have been possible to hold that the suit could proceed in their absence so far as the rest of the property was concerned; but this is not an appeal, and it seems to us impossible to say that the District Judge, in arriving at his decision that permission to withdraw the suit should be given to the plaintiff, has acted illegally or with material irregularity. We are, therefore, unable to interfere with the decision of the District Judge. We dismiss this application with costs.

Application dismissed.

REVISIONAL CRIMINAL.

1915
March, 11.

Before Mr. Justice Chamier and Mr Justice Piggott.

EMPEROR v. GANGUA *

Criminal Procedure Code, section 339—Pardon—Forfeiture of pardon—Procedure—Witness giving evidence at a sessions trial on a conditional pardon disbelieved by Judge.

A conditional pardon was given to G and he was tendered as a witness in a Sessions trial. The Judge before whom he was examined was of opinion that G had not spoken the truth, and, acquitting the accused, directed the prosecution of G. G did not plead his pardon before the committing Magistrate, but did plead it before the Sessions Judge, who set aside the commitment and discharged the accused. *Held* that G was entitled to raise the plea before the Sessions Judge though he had not raised it before the committing Magistrate. *Held* also that the Sessions Judge in the former trial had no authority to direct the prosecution of G on any specific charge, but if he thought that G had wilfully concealed anything essential or given evidence on any point which was positively false, he was entitled to record an opinion to that effect and to invite the attention of the District Magistrate to his opinion or possibly to suggest the propriety of G's prosecution. *Emperor* v. *Kothia* (1), *Kullan* v. *Emperor* (2), *Alagirisami* v. *Emperor* (3), *Emperor* v. *Abani Bhushan* (4), referred to.

THE facts of this case are fully stated in the judgement of the Court.

The Assistant Government Advocate (Mr. R. *Malcomson*), for the Crown.

The opposite party was not represented.

CHAMIER and PIGGOTT, JJ.—In this case it appears that one Gangua was suspected of having taken part in a serious dacoity, committed at a village called Manpore in the Etawah district on the 23rd of October, 1913. He made a confession before a Magistrate and received a conditional promise of pardon. He was produced before the Sessions Judge as a witness against Abadua and others (Sessions Trial No. 8 of 1914, Etawah Sessions). The learned Sessions Judge who tried that case came to the conclusion that Gangua had not given true evidence. We have examined the judgement in that case, and in some points we find it a little difficult to follow the reasoning of the learned Sessions Judge. Apparently, however, he was of opinion that Gangua had in any

* Criminal Revision No. 113 of 1915, from an order of L. Marshall, Sessions Judge of Mainpuri, dated the 30th of November, 1914.

(1) (1906) I. L. R., 30 Bom., 611.

(2) (1908) I. L. R., 32 Mad., 173.

(3) (1910) I. L. R., 33 Mad., 514.

(4) (1910) I. L. R., 37 Calc., 61?

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case, whether he was actually concerned in the dacoity or not, made false statements regarding a certain pair of earrings produced as one of the exhibits in the case. He concluded his order, after directing the acquittal of the accused persons then before him, with the following words:—"The approver has not spoken the truth and he will, therefore, forfeit his pardon. The confession made by him may be sufficient for his own conviction on the original charge of dacoity, though it is valueless without corroboration as against his associates. I direct the prosecution of Gangua on a charge under section 397." In accordance with this order proceedings were taken against Gangua and he was committed for trial. In the committing Magistrate's court Gangua did not plead the pardon, and it was apparently taken for granted that the Sessions Judge's order of the 26th of May, 1914, quoted above, was conclusive on this point. When Gangua was placed on his trial before the successor of the learned Sessions Judge who had passed the order of the 26th of May, 1914, he did plead that he had not broken any of the conditions on which pardon had been tendered him, and therefore had not forfeited his pardon. Upon this the learned Sessions Judge appears to have called upon the pleader employed to conduct the prosecution in that particular case to state what evidence he relied upon in order to prove that Gangua had forfeited his pardon. He made a note of various statements on this point made by the pleader, and thereupon passed an order accepting the prisoner's plea that he had not broken the conditions of his pardon, acquitting him and directing his immediate release. The record was called for by this Court on a perusal of the Sessions statements for the district of Etawah for the month of November, 1914, and is before us in order that we may consider the propriety of the above proceedings. We have examined a number of reported cases, in which the question of the change in the law effected by the substitution of the word "forfeited" for the word "withdrawn" in section 339 of the Code of Criminal Procedure has been considered by various High Courts. We may refer to *Emperor* v. *Kothia* (1); *Kullan* v. *Emperor* (2); *Alagirisami* v. *Emperor* (3); *Emperor* v. *Abani Bhushan Chukerbutty* (4).

(1) (1906) I. L. R., 30 Bom., 611.
(2) (1908) I. L. R., 32 Mad., 173.
(3) (1910) I. L. R., 33 Mad., 514.
(4) (1910) I. L. R., 37 Calc., 845.

We are satisfied that the Sessions Judge's order of the 26th of May, 1914, was irregular and has given rise to the difficulties experienced by the Magistrate and the Sessions Judge in dealing with this matter. The Sessions Judge before whom Gangua gave evidence at the trial of Abadua and others had no doubt authority to pronounce his opinion as to the truthfulness or otherwise of the whole or any part of Gangua's evidence, apart from the question whether it was sufficient for the conviction of any of the accused persons then on their trial. If he came to the conclusion that Gangua had wilfully concealed anything essential, or given evidence on any point which was positively false, he was entitled to record an opinion to that effect and to invite the attention of the District Magistrate to his opinion, or possibly to suggest the propriety of Gangua's prosecution. He had no authority to direct the prosecution of Gangua on any specific charge. When the committing Magistrate took up this matter it was open to Gangua to have pleaded his pardon in that court, precisely as he did afterwards before the Court of Session. If he had done so, the Magistrate would have been bound to enquire into the matter, at least to the extent of satisfying himself that there was *primâ facie* ground for holding that Gangua had forfeited his pardon, and to include in his commitment order a statement of the evidence on which he relied as establishing this fact. Probably the form of the order passed by the Sessions Judge at the trial of the case against Abadua and others prevented the committing Magistrate from looking at the matter from this point of view. When the case against Gangua came before the Sessions Court, Gangua was entitled to plead his pardon, and the Sessions Judge was right in recording the plea and in asking the pleader employed to conduct the prosecution what evidence he intended to offer in disproof of the same. Ordinarily, in our opinion, the proper course to have followed in such a case would be, first of all, to have put in evidence the record of the statement made by Gangua as a witness at the former trial, together, if necessary, with evidence as to the identity of the person making that statement. In order to form an opinion whether in the course of that statement Gangua had given false evidence, or had wilfully concealed anything essential, it might very possibly have been necessary for

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the learned Sessions Judge to have recorded evidence in the case, or at any rate the evidence particularly bearing on the question of the recovery of the pair of earrings already alluded to. In passing an order of acquittal without taking any evidence, and without any withdrawal of the prosecution by a public prosecutor properly authorized to withdraw the same under section 494 of the Code of Criminal Procedure, the learned Sessions Judge adopted in our opinion an irregular procedure. At the same time, under the circumstances of this particular case, we are not disposed to interfere. The fact of the matter is, as already pointed out, that the courts concerned, and we have no doubt also the District Magistrate, were placed in a difficulty by the irregular order passed by the Sessions Court on the 26th of May, 1914. Apparently, in the opinion of those responsible for conducting the prosecution, Gangua had not given false evidence, either in respect of this pair of earrings or in any other matter of importance. Consequently, when the learned pleader instructed by the District Magistrate was called upon to inform the Sessions Judge what evidence there was on which he relied as showing that Gangua had forfeited his pardon, he was unable to state that evidence to the satisfaction of the Sessions Court. It would seem that this prosecution ought never to have been instituted and would never have been instituted, but for the Sessions Judge's order of the 26th of May, 1914. For these reasons we decline to interfere in this matter, and merely order that the record be returned. If Gangua is under arrest he should be at once released; otherwise his security is hereby discharged.

Record returned.

Before Mr. Justice Chamier.

EMPEROR v. BHAJAN TEWARI.*

1915 *March*, 13.

Civil Procedure Code (1908), *sections* 68 *and* 70; *schedule III—Execution of decree by Collector—Delegation to Assistant Collector of functions of Collector—Application to Assistant Collector to take action* ultra vires—*Act No. XLV of* 1860 *(Indian Penal Code)*, *section* 182.

A obtained a decree for money against *B*. In execution thereof certain immovable property was ordered to be sold, and the execution was transferred to the Collector of Basti under section 68 of the Code of Civil Procedure. The

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* Criminal Revision No. 117 of 1915, from an order of Shibhan Lal, Magistrate, first class, of Basti, dated the 8th of January, 1915.

property was sold and purchased by, *C. B* applied for permission to deposit the sum decreed and five per cent of the purchase money. He next presented a petition saying that he had made the required deposit. Subsequently he put in a petition to the effect that some unauthorized person had paid the money into the Treasury, and that he had been compelled to put his thumb impression on a blank paper which was used for the petition aforesaid. This petition was presented to the Assistant Collector and that officer ordered *B's* prosecution under section 182, Indian Penal Code.

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Held, that inasmuch as the Assistant Collector had no power to deal with *B's* applications except by passing them on to the Collector, section 182 of the Indian Penal Code did not apply and the Assistant Collector had no jurisdiction to order B to be prosecuted thereunder.

THE facts of this case were as follows:—

One Bindhachal Tewari obtained a decree for money against Bhajan Tewari and others in the court of the Munsif of Basti. In execution of that decree immovable property was ordered to be sold, and the execution of the decree was transferred under section 68 of the Code of Civil Procedure to the Collector of Basti. On the 23rd of October, 1914, a sale took place, and the property was knocked down to one Ramphal Misra. On the 3rd of November, 1914, the judgement-debtor presented a petition under rule 30 of the rules made by the Local Government under sections 68 and 70 of the Code of Civil Procedure praying for permission to pay the sum decreed and five per cent. of the purchase money. Next day he presented a petition in which he said he had paid in the sum required by rule 30, and he prayed that the sale might be set aside. On the 5th of November, he put in a petition saying that some unauthorized person had paid the money into the Treasury and he charged Bansi and others with having compelled him to put his thumb impression on a blank paper which was subsequently used for the petition under rule 30.

The Assistant Collector on perusal of this application directed the prosecution of Bhajan Tewari under section 182 of the Indian Penal Code. Bhajan Tewari applied in revision against this order to the High Court.

Mr. *R. K. Sorabji*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

CHAMIER, J.—This is an application for revision of an order passed by an Assistant Collector of the first class in the Basti

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district directing the prosecution of the applicant for an offence under section 182 of the Indian Penal Code. A question might arise as to whether this application should not have been presented under section 115 of the Code of Civil Procedure and not under chapter 32 of the Code of Criminal Procedure. But in the view I take of the case it is unnecessary to discuss the question. It appears that one Bindhachal Tewari obtained a decree for money against Bhajan Tewari and others in the court of the Munsif of Basti. In execution of that decree immovable property was ordered to be sold, and the execution of the decree was transferred under section 68 of the Code of Civil Procedure to the Collector of Basti. On the 23rd of October, 1914, a sale took place, and the property was knocked down to one Ramphal Misra. On the 3rd of November, 1914, the judgement-debtor presented a petition under rule 30 of the rules made by the Local Government under sections 68 and 70 of the Code of Civil Procedure praying for permission to pay the sum decreed and five per cent. of the purchase money. Next day he presented a petition in which he said he had paid in the sum required by rule 30, and he prayed that the sale might be set aside. On the 5th of November, he put in a petition saying that some unauthorized person had paid the money into the Treasury and he charged Bansi and others with having compelled him to put his thumb impression on a blank paper which was subsequently used for the petition under rule 30. It is quite clear that the Assistant Collector to whom these applications were presented was a public servant, and I will assume that a charge might properly be brought against Bhajan Tewari under section 182 of the Indian Penal Code in respect of the statements made by him in his third petition. On behalf of Bhajan it is, however, contended that the Assistant Collector, who ordered his prosecution, had no power to do so, not being a civil, criminal or revenue court. The Assistant Collector has the powers of a Magistrate of the first class; but the application was not made to him as a Magistrate, it is clear that it was not made to him as a revenue court, and it is beyond question that even if the officer in question could be regarded as a criminal or revenue court, the alleged offence was not committed before him or brought under his notice in the course of any judicial proceeding of a

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criminal or revenue court. The question is whether the Assistant Collector was, or had the powers of a Civil Court in respect of the application made by Bhajan Tewari. The rules made by the Local Government, above referred to, contain provisions authorizing a Collector to make over to any Assistant Collector of the first class any of the powers and duties conferred by the rules upon the Collector with certain exceptions. It seems that in respect of powers and duties delegated by the Collector to an Assistant Collector of the first class the latter may be a Civil Court, for section 70 of the Code of Civil Procedure authorizes the Local Government to make rules conferring upon a Collector or any gazetted subordinate of the Collector all or any of the powers which the court, that is, the Civil Court, might have exercised in the execution of the decree, if the execution had not been transferred to the Collector. Among the powers of a Collector which may not be delegated to an Assistant Collector under the rules are the powers to order a sale under paragraph (1) (c) and certain other paragraphs of the third schedule to the Code of Civil Procedure and the power to confirm a sale or set aside a sale under rule 32 of the rules made by the Local Government. It thus appears that the Assistant Collector who has ordered the prosecution of the applicant had not power either to sell the property as a court or to confirm the sale or to set it aside. The application in respect of which the prosecution has been ordered was presented to the Assistant Collector. Possibly no objection could be taken to this; but the Assistant Collector could not deal with the application. He could only pass it on to the Collector who would then dispose of it with the powers of a Civil Court. It appears to me that so far as the application in question was concerned, the Assistant Collector had not powers of a Civil Court and the application was not presented to him in the course of a judicial proceeding. That being so, I must hold that the Assistant Collector had no power to order the prosecution of the applicant. I therefore set aside his order.

Order set aside.

1915
March, 16.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Piggott

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) *v* JAWAHIR LAL (PLAINTIFF)*.

Act No. XXIII of 1871 (Pensions Act), section 4, 5, 6—Suit for a declaration affecting the liability of Government—Jurisdiction of Civil Court.

The plaintiff came into Court claiming in effect a declaration that he was entitled to be considered as the assignee of the government revenue payable in respect of certain property as being the reversioner to one Dalpat Rai who was the last assignee. He produced a certificate purporting to be a certificate under section 6 of the Pensions Act, 1871, but it was a certificate granted in respect of some former litigation between the plaintiff and a rival claimant to the property.

Held that the suit as framed could not be entertained without the production of a certificate in conformity with section 6 of Act No. XXIII of 1871; that the certificate produced was not in conformity with section 6 of the said Act, and that in any case it would be impossible to pass a decree in favour of the plaintiff without affecting the liability of Government to pay such grant within the meaning of the section. *The Secretary of State for India v. Moment* (1) distinguished.

THE facts of this case were as follows:—

The plaintiff came to court alleging that one Dalpat Rai was a grantee of the Government revenue of the villages Mohammadpur Bayar and Lakhanpur from Muhammadan Emperors, and that the British Government had continued that grant. On the death of Dalpat Rai his daughter inherited the right to get the Government revenue and on her death her husband Durga Prasad had his name recorded as a grantee of Government revenue. The plaintiff sold a portion of the property to a certain person and sued Durga Prasad to recover the remainder and obtained a decree. His vendee also brought a suit against the daughter of Durga Prasad, but his suit was dismissed on the ground that Jawahir Lal was not a reversioner of Dalpat Rai. Durga Prasad died and the Revenue Court recorded the name of the Government in place of Durga Prasad. The plaintiff therefore brought this suit for declaration that he is entitled to recover the Government revenue The defence pleaded among others was that the suit was governed by the provisions of sections 4 and 6 of the Pensions

* First Appeal No. 225 of 1912, from a decree of Gokul Prasad, Subordinate Judge of Shahjahanpur, dated the 4th of April, 1912.

(1) (1912) I. L. R., 40 Calc., 391.

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Act and the suit could not be maintained without a certificate from the Collector, and that the Civil Court had no power to make any order affecting the right of the Government. The defence also denied the plaintiff's right to the grant as he was not in the direct line of the grantee. The court below decreed the suit. It held that the suit was governed by the Pensions Act but that the plaintiff had produced a certificate dated the 5th of November, 1902, empowering "a Civil Court to try the plaintiff's claim for resumption of *muafi* grant in M. Lakhanpur." That certificate, although granted prior to the recording of the name of the Government, was held to give the plaintiff a right to sue. The defendant appealed to the High Court.

Mr. *A. E. Ryves*, for the Secretary of State in Council :—

The present suit could not be maintained in the absence of a certificate as required by section 6, read with section 4 of the Pensions Act. The certificate granted to the plaintiff in 1902 was inapplicable to this suit. That certificate was given to plaintiff to ascertain which one of two rival claimants should get the revenue. Subsequently Government's name was recorded as entitled to the revenue, and the old certificate was insufficient. Secondly, the concluding part of section 6 barred the suit, as the decree must at least indirectly affect the liability of Government which claimed the revenue itself.—Thirdly the grant was to the grantee and his descendants "generation after generation" (*naslan bad naslan*). This was a restricted grant to the lineal descendants of the grantee, and even if the plaintiff proved that he was, according to Hindu Law, the next reversioner, he would not be entitled to succeed as he was admittedly a collateral and not a lineal descendant.

The Hon'ble Dr. *Tej Bahadur Sapru* (for Mr. *B. E. O'Conor*, with him Pandit *Shiam Krishna Dar*), for the respondents :—

The provisions of the Pensions Act restricting the right of the plaintiff to institute the present suit were *ultra vires*. In a recent case *Secretary of State* v. *Moment*, (1) the Privy Council had held that the Indian Legislature was a subordinate legislature, and could not pass any laws which were opposed to any statute of the British Parliament. He referred to Acts of Parliament dealing with India, (Acts of 1858, and 1861). It was laid down there

(1) (1912) I. L. R., 40 Calc., 391.

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that if a suit could be instituted in respect of a matter against the East India Company before the Government of India was transferred to the Crown, a suit could be instituted in respect of that matter against the Crown through the Secretary of State for India, inspite of any law to the contrary enacted by the Indian Legislature. Before 1871 a suit in respect of this matter could be brought against the East India Company and the provisions of sections 5 and 6 of the Pensions Act were not good law. The Pensions Act did not lay down any particular form for the certificate. Under section 5 a claim had to be preferred to a Collector who could grant a certificate and the Civil Court could thereupon entertain a suit (section 6). A certificate was granted to Jawahir Lal in this case. That enabled him to get a declaration of right. The present suit was brought for that purpose. There is no limit of time during which the certificate could be produced before a court. The law did not require that the certificate should be obtained against the defendant. He further contended that if the certificate produced was not good, the plaintiff should be allowed time to obtain and produce a fresh certificate.

The declaration of the plaintiff's right in this case would not bind the Government to pay Government revenue to the plaintiff. It would only enable him to approach the Government and lay his claim before them. The second paragraph of section 6 did not, therefore, bar the suit. The grant of revenue to a person generation after generation conferred an absolute right upon him.

Mr. *A. E. Ryves* was heard in reply.

RICHARDS, C. J., and PIGGOTT, J.—This appeal arises out of a suit in which the plaintiff claimed a declaration that he has "proprietary right in ten biswas of revenue-free grant in each of the three mahals, Nur Muhammad, Farhat Fatima and Intizam-ud-din, in Mauza Lakhanpur," and that the name of the Government may be expunged. The claim does not appear to be accurately expressed. What the plaintiff really claims is that in the events which have happened, he is now entitled to be considered as the assignee of the Government revenue payable in respect of the 10 biswas. His real claim is that the last assignee

of this Government revenue was one Dalpat Rai, who died leaving a daughter Musammat Ram Piari. He claims that now he is entitled, as the heir of Dalpat Rai, under Hindu Law, to have the same rights as Dalpat Rai enjoyed.

The court below granted the plaintiff a decree declaring that he is entitled by right of succession to Dalpat Rai, as the *muafidar* assignee of the Government revenue of the 10 biswas share in the three mahals.

The Secretary of State has appealed, and it is contended first that the court below ought not be have entertained the suit because the plaintiff had not obtained the certificate referred to in sections 5 and 6 of Act XXIII of 1871; secondly, that the decree of the court below is in contravention of the provisions of section 6 of the same Act; and thirdly that the title which Dalpat Rai had to be deemed the assignee of the Government revenue came to an end with his lineal descendants.

The plaintiff submits that the provisions of sections 5 and 6 do not apply; secondly, that if it was necessary to obtain a certificate he did in fact obtain one; thirdly, that the decree of the court below does not in any way contravene the provisions of section 6.

It appears that some time after the year 1902, the plaintiff brought a suit in respect of certain zamindari which belonged to Dalpat Rai. He succeeded then, in establishing his title to the property he sued for. He did not, in that suit, include the Government revenue which he now claims. As a matter of fact he had already assigned it to third parties. A vendee from the plaintiffs also brought a suit in respect of some other zamindari which had at one time belonged to Dalpat Rai.

In that case the court dismissed the suit on the ground that the then plaintiff had failed to prove that the present plaintiff was the reversioner to Dalpat Rai.

Section 4 of Act XXIII of 1871 is as follows:—

"Except as hereinafter provided no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant and whatever may have been the nature of the payment, claim or right for which such pension or grant may have b substituted.

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"SECTION 5. Any person having a claim relating to such pension or grant may prefer such claim to the Collector of the district or Deputy Commissioner or other officer, who shall dispose of such claim in accordance with such rules as the Chief Revenue authority may, subject to the general control of the Local Government, from time to time, perscribe in this behalf.

"SECTION 6. A Civil Court, otherwise competent to try the same, shall take cognizance of any such claim upon receiving a certificate from such Collector, Deputy Commissioner or other officer authorized in that behalf that the case may be so tried, but shall not make any order or decree in any suit whatever by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly."

The plaintiff seems to have procured a certificate, dated the 5th of November, 1902, probably in connection with the previous suit to which we have already referred. This certificate will be found at page 7 of the respondent's book. The plaintiff contends that if the provisions of Act XXIII of 1871 applied to the present case, then the production of that certificate is a sufficient compliance with the provisions of section 6. The argument of the plaintiff that the provisions of Act XXIII of 1871 do not apply to his case is based on the decision of their Lordships of the Privy Council in the case of *The Secretary of State for India* v. *Moment* (1). In that case it was held that certain provisions in the Burma Act, Act IV of 1898, were *ultra vires* in so far as it enacted that no Civil Court should have jurisdiction to determine any claim to any right over land as against the Government. Their Lordships referred to the Act of 1858, and to the Indian Councils Act of 1861. By section 65 of the Act of 1858 it was provided that—

"The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company."

Their Lordships proceed as follows:—

"Their Lordships are of opinion that the effect of section 65 of the Act of 1858, was to debar the Government of India from passing any Act which could prevent a subject from suing the Secretary of State in Council in a Civil Court in any case in which he could have similarly sued the East India Company."

On referring to Act XXIII of 1871 it will be found that until the passing of that Act there had been a regulation in force, namely, XXIV of 1793, section 17 of which barred the jurisdiction

(1) (1912) I. L. R., 40 Calc., 391.

of Civil Courts in a suit like the present. This section was repealed by Act XXIII of 1871. It would, therefore, seem that the East India Company could not have been sued at the time of the transfer of its powers and liabilities to the Crown. The case cited, therefore, does not apply to the present case. If the provisions of section 6 do apply it was necessary that the plaintiff should produce the certificate specified in this section. It seems to us that the certificate which, in fact was produced, is not a compliance with the section. In the first place it is dated 1902, long before the present claim was contemplated. It was a certificate that the claim of Jawahir for *resumption of a muafi grant* might be tried by a Civil Court. At that time there were rival claimants to the property of Dalpat Rai. The present suit is not a suit to establish the right of one of two rival claimants, but is a suit against the Secretary of State in Council. Furthermore it seems to us that we could not possibly make a decree declaring that the plaintiff was the assignee of the Government revenue without "making an order or a decree which would directly or indirectly affect the liability of Government to pay a grant of Government revenue" The original *Sanad* is not on the record; such evidence as there is shows that it was a grant "naslan bad naslan," that is to say, from "generation to generation." It is not usual to make a grant of Government revenue by way of absolute grant and if the grant was only made to the original grantee and his lineal descendants, then the plaintiff has no claim. Admittedly he is not a lineal descendant. If, on the other hand, it was a grant of the absolute interest, then the owner for the time being could do what he liked with the subject matter of the grant. If the grant was of this nature, then the plaintiff by his own admission has alienated the revenue to third parties, in which case he has no title. The plaintiff asks that in any event we should give him a declaration that he is the nearest reversioner to Dalpat Rai. The court below has found that he is the nearest reversioner. As already pointed out, in one previous suit he satisfied the court that he was the nearest reversioner. On the other hand, a vendee from him failed to prove in another court that the plaintiff was the nearest reversioner of Dalpat Rai. The plaintiff says that a declaration of this kind may help him to

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come to a settlement with the Government. We do not feel called upon to decide the question, but at the same time we do not express any disagreement with the finding of the court below. In our opinion we are precluded from making any declaration that would in any way directly or indirectly affect the liability of Government to pay this revenue to the plaintiff. We, therefore, think upon all these grounds that the plaintiff's suit was misconceived and ought to have been dismissed.

We accordingly allow the appeal, set aside the decree of the court below and dismiss the plaintiff's claim with costs in all courts.

Appeal allowed.

REVISIONAL CIVIL.

1915
March, 22.

Before Mr. Justice Chamier and Mr. Justice Piggott.

EMPEROR *v.* TILAK PANDEY AND OTHERS. *

Criminal Procedure Code, section 476—Jurisdiction—Limitation.

There is nothing in section 476 of the Code of Criminal Procedure which requires a court to take action, if at all, immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter. *In the matter of the petition of Nawal Singh* (1) *Girwar Prasad* v. *King-Emperor* (2) followed; *Aiya Kannu* v. *Emperor* (3) *Rahimadulla* v. *Emperor* (4) not followed. *In re Lakshmi Das* (5) *Emperor* v. *Rustomji Harmusji Tarwalla* (6), referred to.

THE facts of this case were as follows :—

One Musammat Mohra brought a suit to establish her right to certain property as the daughter of Sheo Narain. The applicants and others brought another suit against Musammat Mohra for possession of property on the ground that she was not the daughter of Sheo Narain. The two cases were tried together, and the Subordinate Judge found that Musammat Mohra was the daughter of Sheo Narain. He waited for a month probably to see whether appeals would be filed against his decision, and as soon as the month had expired he took proceedings against the applicants under section 476 of the Code of Criminal Procedure.

The applicants thereupon applied in revision to the High Court to have the Subordinate Judge's order set aside upon

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* Civil Revision No. 175 of 1914.

(1) (1912) I. L. R., 34 All., 393.
(2) (1906) 6 A. L. J., 392.
(3) (1908) I. L. R., 32 Mad., 49.
(4) (1907) I. L. R., 31 Mad., 140.
(5) (1907) I. L. R., 32 Bom., 184.
(6) (1902) 4 Bom., L. R., 778.

the main ground that he had no jurisdiction to take action against them a month or more after he had disposed of the cases in which the offences were alleged to have been committed.

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Munshi *Lakshmi Narain* and Munshi *Harnandan Prasad*, for the applicants.

The Government Advocate (Mr. *A. E. Ryves*,) for the Crown.

CHAMIER, and PIGGOTT, JJ.—This is an application for revision of an order of the Subordinate Judge of Gorakhpur under section 476 of the Code of Criminal Procedure directing the prosecution of the applicants on various charges in connection with pleadings verified, and evidence given, by them in two cases tried by the Subordinate Judge. It appears that one Musammat Mohra brought a suit to establish her right to certain property as the daughter of Sheo Narain. The applicants and others brought another suit against Musammat Mohra for possession of property on the ground that she was not the daughter of Sheo Narain. The two cases were tried together, and the Subordinate Judge found that Musammat Mohra was the daughter of Sheo Narain. He waited for a month, probably to see whether appeals would be filed against his decision, and as soon as the month had expired he took proceedings against the applicants under section 476 of the Code of Criminal Procedure. On the part of the applicants it is contended that the Subordinate Judge had no jurisdiction to take action against them a month or more after he had disposed of the cases in which the offences are alleged to have been committed. We have been referred to several decisions on the subject. A full Bench of the Madras High Court (MILLER, J. dissenting) has held that the power conferred by section 476 of the Code of Criminal Procedure can be exercised by the court only in the course of the judicial proceedings or at its conclusion, or so shortly thereafter as to make it really the continuation of the proceeding in the course of which the offence was committed, or brought to notice, see, *Aiya Kannu Pillai* v. *Emperor* (1), which followed a previous decision of the same court in *Rahimadulla Sahib* v. *Emperor* (2). The Madras High Court declined to follow the decision of the Bombay High Court,

(1) (1908) I. L. R., 32 Mad., 49 (2) (1907) I. L. R., 31, Mad., 140.

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In re Lakshmidas Lalji, (1), in which the learned Judges said that they were unable to find anything in the language of section 476 making it incumbent upon a court acting under it, to take action if at all, within any particular period or at any particular time. There is also a reported decision to the effect that action should not be taken by a court under section 476 before the close of the case in which the offence is brought to the notice of the court, see *Emperor* v. *Rustomji Harmusji Tarwalla* (2). This Court in *Girwar Prasad* v. *King-Emperor* (3) declined to follow the decision of the Madras High Court referred to above, and held that a munsif had jurisdiction to take action under section 476, eighteen months or more after the conclusion of the case in which the offences were said to have been committed and in *In the matter of the petition of Nawal Singh*, (4) Mr. Justice BANERJI upheld the order of a Subordinate Judge passed under section 476, several years after the conclusion of the case in which the offences were said to have been committed. We agree with the view which has hitherto been taken by this Court that there is nothing in section 476 which requires a court to take action, if at all, immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter. Cases can easily be imagined where it would be impossible or inadvisable to take action immediately on the conclusion of the case. In the present case the Subordinate Judge appears to us to have exercised a wise discretion in abstaining from taking action against the applicants until he knew that no appeal had been filed against his decision. It would have been useless to prosecute the applicants for the offences which they are supposed to have committed, if there had been an appeal in the case and the District Judge had held that Musammat Mohra was not the daughter of Sheo Narain. We express no opinion on the merits of the case or on the advisability of the prosecution which has been ordered. In our opinion the Subordinate Judge had jurisdiction to direct the prosecution of the applicants, and we have, therefore, no power to interfere with his order. The application is dismissed with costs.

Application dismissed.

(1) (1907) I. L. R., 32 Bom., 184.
(2) (1902) 4 Bom. L. R., 778.
(3) (1909) 6 A. L. J., 392.
(4) (1902) I. L. R., 24 All., 390.

APPELLATE CIVIL.

1915
March, 23.

Before Mr. Justice Tudball and Mr. Justice Rafiq.

SECRETARY OF STATE FOR INDIA IN COUNCIL (OPPOSITE-PARTY) *v.* ABDUL SALAM KHAN (PETITIONER)*

Act No I of 1894 (Land Acquisition Act), sections 35 and 36, clause (2)—Compensation—Principle on which it should be awarded.

Where culturable land in the hands of tenants was acquired temporarily for the purpose of digging kankar, it was *held* that, having regard to section 36 of the Land Acquisition Act, 1894, such portion of the compensation as might be awarded to the owner for the purpose of restoring the land to its original condition was not assessable until after the term of occupation had expired In the circumstances of the case also this amount was not rightly assessed on the probable value of the kankar which might hypothetically be extracted from the land.

THIS was an appeal arising out of proceedings taken under the Land Acquisition Act.

The Government acquired a certain piece of land in the village of Manakpur Naroli temporarily for a term of two years under section 35 of the Land Acquisition Act for the purpose of quarrying kankar. The land was culturable land in the hands of tenants. Compensation was offered to the tenants for the period of their ouster and four years' rent was offered to the zamindar as compensation. It was further explained to him that on the expiry of the two years he would be entitled to a further compensation for any damage done to the land, under section 36, clause 2, of the Land Acquisition Act. The zamindar refused to accept the Collector's award and alleged that he should get Rs. 18 per bigha kham. On a reference to the District Judge the zamindar's objection was allowed in part.

The Secretary of State for India preferred an appeal to the High Court and the respondent filed objections claiming the amount the District Judge had disallowed.

The Government Advocate (Mr. *A. E. Ryves*) for the Secretary of State for India:—

The court below has entirely misconceived the zamindar's objection and the scope of its enquiry. There was no claim to the kankar on the part of the zamindar. The kankar was Government property. In these provinces at any rate, wherever

*First Appeal No. 379 of 1913, from a decree of Saiyad Muhammad Ali, District Judge of Moradabad, dated the 7th of June, 1913.

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the permanent settlement is not in force kankar and all minerals as a general rule belong to the Government. The learned Judge tried first of all the question as to how much kankar would probably be recovered per bigha and what its market value would be. Both questions were irrelevant. The Collector awarded to the zamindar more than he claimed for the loss of rental for the period of acquisition, and there was his further order under section 36, clause (2), which should be taken into consideration.

Mr. *Hameed-ullah* for the respondent :—

The digging up of the kankar quarries for two years would considerably reduce the landlord's income from the land in future. The yearly rent of the land acquired was no criterion for determining the compensation. The landlord's income from all sources should be taken into account at the time of awarding compensation. The municipality never disputed the landlord's right. The landlord used to get Rs. 18 per bigha kham from the kankar contractors and therefore the conpensation awarded by the District Judge was insufficient.

Mr. *A. E. Ryves* was not heard in reply.

TUDBALL and RAFIQ, JJ.—This appeal arises out of proceedings taken under section 35 of the Land Acquisition Act. Government acquired an area of four acres, twenty poles, situated in the village of Manakpur Naroli temporarily for a term of two years under the section for the purpose of quarrying kankar. The land was culturable land in the hands of tenants. Compensation was offered to the tenants for the period of their ouster and a sum of Rs. 105-6-0 was offered as compensation to the zamindar and it was explained to him that on the expiry of the two years term, he would be entitled to further compensation for any damage done to the land, under section 36, clause (2), of the Land Acquisition Act. He objected to the amount offered to him and he put forward his plea in this way that by reason of the kankar being dug, the surface of the land would be lowered, earth would have to be brought from elsewhere to raise it and make it fit for cultivation. This being so he was entitled to two sorts of compensation, (1) to two years rent for the period of occupation and (2) to compensation at the rate of Rs. 18 per bigha kham

for levelling the ground and for bringing earth from other plots to make the ground fit for cultivation. This he put forward on the 24th of October, before the Collector. The Collector refused to grant him any sum more than the amount offered and he applied for a reference to the District Judge. Before the District Judge he again claimed the same compensation and asked for an order awarding compensation for levelling the ground after the two years. The learned District Judge awarded to him the sum of Rs. 198 8-0. He arrived at this figure by calculating approximately the amount of kankar which would probably be dug out of the area occupied and valued it at Rs. 7-8-0 per bigha. The total area being 26 bighas 19 biswas he awarded Rs. 198-8-0. Government has appealed and the respondent has also filed objections claiming that he is entitled to compensation at the rate of Rs. 18-0-0 per bigha as he has all along claimed. In our opinion the method adopted by the learned District Judge is *absolutely wrong*. There was no *question of the valuation of* the kankar at all. The respondent put forward no claim thereto. He had asked merely for two years' rent plus compensation at the rate of Rs. 18-0-0 per bigha to cover the cost of re-levelling the land and making it fit for cultivation. We have to point out that the compensation offered by the Collector amounted to four times the annual rent paid by the tenants of the land. It is quite clear that the respondent is also entitled to compensation under section 36, clause (2), of the Act, i.e., compensation which is to cover the cost of re-levelling the land and making it fit for cultivation. But an examination of the section will show that this amount of compensation has to be calculated at the expiry of the period for which the land has been temporarily acquired. The reason of this is obvious, for it is imposible to say in advance what damage will be caused to the land and what it will cost to make that damage good. The *respondent has really in his* petition asked for the payment of that compensation in advance. But he is not entitled to this in "*this*" proceeding. His application in respect thereto is premature. He only asked for two years' rent. The Collector awarded him four years' rent. In our opinion he has been liberally treated. We therefore allow the appeal. We set aside the award of the District Judge. We

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award to the respondent Rs. 105-6-0 as offered to him by the Collector in the beginning. It will still be open to him on the expiry of the period for which the land has been acquired to apply for the compensation mentioned in section 36, clause (2) which he has claimed at Rs. 18-0-0 per bigha and in respect to which we express no opinion in the present proceeding. The objections are disallowed with costs and the appellant will have his costs in both courts.

Appeal allowed.

1915
March, 24.

Before Mr. Justice Chamier and Mr. Justice Piggott.

LAKHPATI (DEFENDANT) v. RAMBODH SINGH (PLAINTIFF) AND RAM RAJ SINGH AND ANOTHER (DEFENDANTS)*.

Attestation of instrument—Witness how far affected with knowledge of contents.

The mere attestation of an instrument by a person does not necessarily import concurrence by him in the transaction evidenced thereby. *Raj Lukhee Dabia* v. *Gokool Chundar Chowdhry* (1) referred to. The question whether attestation of document should be held to imply assent is a question of fact and must be determined with reference to the circumstances of each case and the High Court cannot entertain it in second appeal. *Deno Nath Das* v. *Kotiswar Bhattacharya* (2) and *Mewa Singh* v. *Bhagwant Singh*, (3) referred to.

THE facts of this case were as follows:—

Musammat Kalwanti, the widow of a separated Hindu, named Jita, mortgaged her husband's property to the appellant by two deeds, dated the 28th of January, 1907, and the 7th of August, 1908. At the time of these transactions there were living Sarju Dei, who is said to be a daughter of Jita, Budhai, the son of a deceased brother of Jita and Ram Raj and Ram Bodh, sons of another deceased brother of Jita. The three nephews were the sole presumptive reversionary heirs of Jita. Ram Bodh was a minor living in union with his brother Ram Raj who joined in executing both mortgages and Budhai attested both as a witness. Ram Bodh, who is still a minor, brought this suit in 1910, for a declaration that the mortgages were not binding upon him. The Subordinate Judge held that the earlier mortgage was not proved to have been made for lawful necessity at all, and that the later

*Second Appeal No. 1532 of 1913, from a decree of B. J. Dalal, District Judge of Benares, dated the 17th of May, 1913, reversing a decree of Pratab Singh, Subordinate Judge of Jaunpur, dated the 7th of October, 1912.

(1) (1869) 13 Moo. I. A., 209. (2) (1913) 21 Indian cases, 367.

(3) (1909) 5 Indian cases, 252.

mortgage was proved to have been for lawful necessity to the extent of Rs. 282 out of Rs. 800, but he held that Ram Bodh was bound by his elder brother's consent to the transactions, and that Budhai's consent to them was proved by the fact that he attested them; therefore the whole body of male reversioners must be taken to have consented to the transactions, and the plaintiff was not entitled to challenge them. On appeal the District Judge agreed with the first court as to the extent to which the mortgage had been shown to be supported by legal necessity, but he held that the attestation of the deeds by Budhai did not prove that he had consented to the mortgages, and that the plaintiff was not bound by the elder brother's consent, because it had been neither alleged nor proved that he had acted for the benefit of the plaintiff. Both the courts below have held that the presence of a legitimate daughter of Jita, even if proved, did not prevent the plaintiff from maintaining the suit. The learned District Judge gave the plaintiff a declaration that the earlier deed was not binding upon him and that the later was binding only to the extent of Rs. 282. The defendant appealed to the High Court.

Dr. *Satish Chandra Banerji,* for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* and Dr. *Surendro Nath Sen*, for the respondents.

CHAMIER and PIGGOTT, JJ.—The facts of this case are that Musammat Kalwanti, the widow of a separated Hindu, Jita, mortgaged her husband's property to the appellant by two deeds, dated the 28th of January, 1907, and the 7th of August, 1908. At the time of these transactions there were living Sarju Dei, who is said to be a daughter of Jita, Budhai, the son of a deceased brother of Jita and Ram Raj and Ram Bodh, sons of another deceased brother of Jita. The three nephews were the sole presumptive reversionary heirs of Jita. Ram Bodh was a minor living in union with his brother Ram Raj who joined in executing both mortgages and Budhai attested both as a witness. Ram Bodh who is still a minor, brought this suit in 1910, for a declaration that the mortgages were not binding upon him. The Subordinate Judge held that the earlier mortgage was not proved to have been made for lawful necessity at all, and that the later

long ago as 1869 their Lordships of the Privy Council said that mere attestation of an instrument by a person did not necessarily import concurrence by him. It might no doubt be shown by other evidence that when he became an attesting witness he fully understood what the transaction was and that he was a concurring party to it, but from the mere subscription of his name that inference did not necessarily arise [*Raj Lukhee Dabia* v. *Gokool Chundar Chowdhry* (1)] and it has been held, in several cases by different courts in India, that the question whether the attestation of a document should be held to imply assent is a question of fact, and must be determined with reference to the circumstances of each case, see for example *Deno Nath Das* v. *Kotiswar Bhattacharya* (2) and *Mewa Singh* v. *Bhagwant Singh* (3).

We must, therefore, accept the finding that Budhai is not proved to have assented to the transactions in question and it follows that it is not proved that there was such assent on the part of the reversionary body as to raise a presumption that the mortgages were made for purposes binding on the reversioners.

The appeal fails and is dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr Justice Piggott.

EMPEROR. *v.* MUKHTAR AHMAD AND ANOTHER *

1915 March, 24.

Act No XLV of 1860 (The Indian Penal Code), sections 332, 323—Public servant in the execution of his duty as such—House search by Excise Inspector without a warrant—Assault on Inspector.

An Excise Inspector in searching the house of a person, under the suspicion that he would find cocaine there, committed many irregularities. He had no warrant authorising him to make the search, he had brought only one search witness and he directed a constable to scale the outer wall of the house. The accused assaulted and beat him *Held,* that the Inspector and the constables were not acting in the discharge of their duties as public servants and the accused were not guilty of an offence under section 332 of

* Criminal Revision No. 141 of 1915, from an order of G. C. Badhwar, Additional Sessions Judge of Saharanpur, dated the 22nd of January, 1915.

(1) (1869) 13 Moo I. A., 209. (2) (1913) 21 I. C., 267.

(3) (1909) 5 I. C., 252.

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the Indian Penal Code, but were guilty of an offence punishable under section 323 of the said Code; *Queen-Empress* v. *Dalip* (1) followed.

THE facts of this case were as follows:—

One D.D.C. Das, an Excise Inspector, suspected that the accused Mukhtar Ahmad had cocaine concealed in his house. The Inspector without a search warrant and with only one search witness went to search the house of Mukhtar Ahmad. On finding the front door of the house closed, he directed a constable to scale the outer wall and effect a burglarious entry into the house. The Inspector and his men were resisted and beaten by Mukhtar Ahmad, and Amir Ahmad. The latter were convicted under section 332 of the Indian Penal Code from which order they filed an application in revision to this Court.

Mr. *G. P. Boys*, for the applicants.

The Assistant Government Advocate, (Mr. *R. Malcomson*) for the Crown.

PIGGOTT, J.—Mukhtar Ahmad and Amir Ahmad have been convicted by a Magistrate on the charge of having caused hurt to an Excise Inspector, one Mr. D. D. C. Das, and certain constables in the discharge of their duties as public servants, and have been sentenced to imprisonment and fine. The conviction and the sentences have been affirmed by the Sessions Judge on appeal. It seems to me that the courts below have assumed, but cannot be said to have judicially determined, that the persons who were hurt were acting at the time in the discharge of their duties as public servants. They have dealt with the plea of private defence set up on behalf of the accused persons and have excluded that plea by reason of the provisions of section 99 of the Indian Penal Code. This finding implies that the Excise Inspector and the constables were resisted at a time when they, being public servants, were acting in good faith under colour of their office. That is not the same thing as a finding that they were acting in the discharge of their duties as public servants. The distinction was pointed out by a Bench of this Court in *Queen-Empress* v. *Dalip* (1). So far as my examination of the record goes I do not find myself able to arrive at the conclusion that the Excise Inspector and the constables were acting in the discharge of their

(1) (1896) I.L.R., 18 All., 246.

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duties as public servants. Mr. Das, who was engaged in searching the house of Mukhtar Ahmad, accused, on suspicion that he might find there cocaine, committed a number of irregularities in conducting this search. He had no warrant authorising him to make this search; he brought with him only one search witness (section 103 of the Code of Criminal Procedure), and nothing in sections $\frac{102}{48}$ of the same Code justified him in directing a constable to scale the outer wall and effect a burglarious entry into the house. Following the precedent set by the reported decision of this Court, which I have already quoted, I set aside the conviction of Mukhtar Ahmad, and Amir Ahmad, under section. 332 of the Indian Penal Code and in lieu thereof, convict them of the offence of causing hurt under section 323 of the same Code. I reduce the sentence to one of imprisonment for such period as they may have already undergone, together with a fine of Rs. 15 each. Any fine in excess of this amount which has been paid by applicants will be refunded. The accused need not surrender and their bail-bonds are discharged.

Order modified.

MISCELLANEOUS CRIMINAL.

Before Mr. Justice Piggott.

DHARAM SINGH AND ANOTHER v. JOTI PRASAD.*

1915 *March, 20.*

Criminal Procedure Code, section 206 et seqq—Discharge—Practice—Power and duties of Magistrate inquiring into case triable by the Court of Session.

When a Magistrate has heard the evidence of the prosecution with entire disbelief, when he considers himself in a position to show that the prosecution witnesses are totally unworthy of credit, and *a fortiori* when, after examining certain witnesses named on behalf of the accused, he has come to the conclusion that evidence given by them is reliable and disproves that given by the prosecution he is well within his discretion in discharging the accused. *Faltu* v. *Faltu* (1), *Sheo Bux* v. *King-Emperor* (2) and *In re Bai Parvati* (3) referred to.

THIS was an application for transfer, under section 526 of the Code of Criminal Procedure, of a case pending in the court of the District Magistrate of Saharanpur arising out of an application under section 436 of the Code of Criminal Procedure

* Criminal Miscellaneous No. 8 of 1915.

(1) (1904) I. L. R., 26 All., 564. (2) (1904) 9 C. W. N., 829.

(3) (1911) I. L. R., 35 Bom., 163.

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asking the Magistrate to direct further inquiry into the case of certain persons who had been discharged on an inquiry by a magistrate subordinate to him. The facts out of which the application arose are fully stated in the order of the High Court.

Mr. *C. Dillon*, Mr. *G. P. Boys* and Mr. *Nihal Chand*, for the applicants.

Mr. *W. Wallach* and Babu *Satya Chandra Mukerji*, for the opposite party.

The Government Advocate, (Mr. *A. E. Ryves*), for the Crown.

PIGGOTT, J.—As long ago as the 27th of January, 1914, a serious riot accompanied, with loss of life, took place at a certain village in the Saharanpur district. A number of persons were put on their trial and convicted of offences punishable under sections 148 and $\frac{304}{149}$ of the Indian Penal Code. They appealed to this Court and their appeals were disposed of by an order, dated the 27th of July, 1914, by which the appeals of three of the appellants were allowed and those of the remaining appellants dismissed subject to some modification of the sentences passed. In the course of the enquiry and trial ending with the appellate judgement of this Court above referred to, a question arose as to whether there was not reason to suppose that the persons put on their trial in that case had been acting under the instigation of other and more influential persons, who though not present at the riot themselves, had been guilty of abetment of the same within the meaning of the Indian Penal Code. An enquiry was ordered against two persons, Rana Dharam Singh and Durga Prasad, and one might have hoped that this enquiry would long since have been terminated in the conviction of these persons, or in their acquittal or in their final discharge. The proceedings were unfortunately delayed by an application for transfer made to this Court, the groundlessness of which has been sufficiently exposed by the actual result of the subsequent proceedings. This Court having refused to interfere, the enquiry against these two persons came before a Joint Magistrate of ability and experience, who had not long previously been exercising the powers of a Sessions Judge. He recorded the evidence for the prosecution, examined the accused persons, and at their request, exercised the discretion

conferred upon him by section 212 of the Code of Criminal Procedure to summon and examine some of the witnesses named in the list given to him on behalf of the said accused. As the result of his enquiry he discharged both the accused. An application was thereupon filed in the court of the District Magistrate of Saharanpur by a gentleman of the name of Rai Bahadur Lala Jyoti Prasad, who appears to have some interest in the success of this prosecution, asking the District Magistrate to exercise the powers conferred upon him by section 436 of the Code of Criminal Procedure, to order Rana Dharam Singh and Durga Prasad, to be committed for trial before the Court of Session. The matter was again brought before this Court on an application for transfer. Unfortunately the proceedings in this Court were delayed by various accidental circumstances, and it became a question whether this proceeding could be allowed to drag its course much longer without scandal to administration of justice. I finally called for the record of the proceedings in the Joint Magistrate's court, and gave notice, both to the prosecution and to the defence, that I proposed to take the whole matter up, in the exercise of the revisional jurisdiction of this Court. I have, to-day, examined the record, considered the evidence in detail and heard the arguments addressed to me on both sides. There has been some discussion also on a point of law which is supposed to arise with regard to the discretion of a Magistrate in conducting an inquiry preliminary to commitment. The law, so far as this Court is concerned, seems to have been definitely laid down in the case of *Fattu* v. *Fattu* (1), where some older cases of this Court are referred to and considered. It has been urged upon me in argument that the learned Judges of the Calcutta High Court, as for instance in the case of *Sheo Bux* v. *King-Emperor* (2), have taken a somewhat different view regarding the discretion of a Magistrate under the circumstances stated. One learned Judge of that Court laid it down, in effect, that a Magistrate conducting preliminary enquiry had only to consider whether there was evidence against the accused person or persons upon which a jury could lawfully convict them of the offence alleged against them, and if he found that this was so, had no descretion but to commit the accused

(1) (1904) I. L. R., 26 All., 564. (2) (1904) 9 C. W. N., 829.

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for trial. This does not seem to me to follow from the provisions of section 209 or 210 of the Code of Criminal Procedure, and seems scarcely consistent with the provisions of the second clause of section 213 of the same Code. The Bombay High Court, *In re Bai Parvati* (1), has held, in express terms, that, where a committing Magistrate finds that there is no evidence whatever, or that the evidence tendered for the prosecution is totally unworthy of credit, it is his duty, under section 209 of the Criminal Procedure Code, to discharge the accused. In my opinion when a Magistrate has heard the evidence for the prosecution with entire disbelief, when he considers himself in a position to show tha the prosecution witnesses are totally unworthy of credit, an *a fortiori* when, after examining certain witnesses named on beha of the accused, he has come to the conclusion that the eviden given by them is reliable and disproves that given by the prosec tion witnesses, he is well within his discretion in dischargin the accused. The question then before me is merely wheth there has been a wrong exercise of discretion in the present cas By calling up the matter in revision I have virtually taken upo myself the exercise of the discretion conferred by law on a Distri Magistrate or a Court of Sessions. My reasons for doing this have already explained. I think it is expedient that this matte should be disposed of once for all either by my directing th commitment of Rana Dharam Singh and Durga Prasad to th Court of Session or by an order dismissing the application of Ra Bahadur Lala Jyoti Prasad against the order of discharge. In my opinion the reasons given by the Magistrate in the present case for discrediting the prosecution evidence are sound and convincing. As regards some of the witnesses incidents had occurred in the course of the enquiry by which their evidence was thoroughly discredited and would have been something of a scandal to the administration of justice to permit the same witnesses to repeat their false evidence, with necessary corrections and amendments, in the presence of the Sessions Court. The witness Har-b[illegible]s was asked in cross-examination a question so entirely relevant and proper that, after perusal of his evidence-in-chief, this was the very first question which presented itself to my mind and I

(1) (1911) I. L. R., 35 Bom., 163.

is obviously illegal. An offence punishable under section 325, Indian Penal Code, is no doubt compoundable with the permission of the court, but it is compoundable by the person to whom the hurt was caused. In this case the person to whom the hurt was caused was dead and the case was certainly not compoundable by his widow.

In dealing with this matter to-day we are placed in a certain difficulty. Moti, son of Pir Bakhsh, has been arrested and has had notice of to-day's hearing. He has been represented before us by counsel. The other three accused persons cannot be found and are presumably absconding. The warrant issued by this Court for their arrest has not hitherto been executed. Notices of to-day's hearing were issued to them and they have been served on their near relatives, but they themselves cannot be found. The Government Advocate, who appears in support of the appeal, informs us that he is willing to withdraw the appeal as against the three absconding accused provided this Court is prepared to take up the case so far as they are concerned in the exercise of its revisional jurisdiction. The case is a very clear one and there is no question of convicting any of the accused on evidence upon the record. Over and above setting aside an order of acquittal, all that we could do would be to direct these persons to be tried. Under these circumstances we think that the three absconding accused have been given a reasonable opportunity of being heard to-day in their defence, within the meaning of the 2nd clause of section 439, Code of Criminal Procedure, and that we can take up the question as regards them in the exercise of our revisional jurisdiction.

With regard to Moti, son of Pir Bakhsh, therefore we so far accept this appeal that we set aside the order of acquittal passed in respect of the said Moti and direct that he be put on his trial before the Court of Session. As regards Rahmat, Jhandu and Moti, son of Khilari, the Government appeal against their acquittal is withdrawn. Taking up the matter in the exercise of our revisional jurisdiction we set aside the order acquitting these three men, which is clearly an illegal order. We leave the local authorities to take such steps with regard to the prosecution of these three men as they may consider suitable.

Appeal decreed.

1915
April 21.

APPELLATE CIVIL.

Before Mr. Justice Chamier and Mr. Justice Piggott.

UMRAO KUNWAR AND ANOTHER (DEFENDANTS) *v.* BADRI (PLAINTIFF) AND NIADAR (DEFENDANT).*

Hindu Law—Execution of a will by a Hindu widow—Suit for declaration by reversioner—Cause of action—Whether suit maintainable.

A Hindu widow executed a will and thereby bequeathed her husband's property in her hands to a certain person purporting to do so under the oral directions of her husband. The next reversioner brought this suit for a declaration that the will in question was void and ineffectual as against his interest. *Held*, that the mere execution of the will did not afford a sufficient reason for granting a declaratory decree. *Ram Bhajan* v. *Gurcharan* (1) followed; *Jaipal Kunwar* v. *Indar Bahadur Singh* (2) referred to.

THE facts of this case are fully set forth in the judgement.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the appellants.

Dr. *S. M. Sulaiman*, for the respondent.

CHAMIER and PIGGOTT, JJ.—This was a suit by a plaintiff claiming to be the next reversioner under the Hindu Law to the estate of one Dewa. The said Dewa died leaving a widow, Umrao Kuar. This lady has executed a will bequeathing the property in her hands as widow of Dewa to one Tika Ram, son of Niadar, brother of the said Dewa. In the will there is a recital to the effect that the bequest is made in accordance with oral directions given by Dewa. The plaintiff sought a declaration that the will in question is void and ineffectual as against his interest, and that Tika Ram, who was impleaded as defendant No. 2, will acquire no rights under the said will. The court of first instance dismissed the suit upon a preliminary point, holding that there had been no alienation by Umrao Kuar of the property in her hands, and that under the circumstances the mere execution of a will would not afford a sufficient reason for granting a declaratory decree It supported itself by a quotation from Mulla's Principles of Hindu Law. The learned District Judge on appeal has reversed the finding on the preliminary point and remanded the case for trial on the merits. He bases his

*First Appeal No. 23 of 1915 from an order of L. Johnston, District Judge of Meerut, dated the 1st of August 1914.

(1) (1904) 1 A.L.J. R., 468. (2) (1904) I.L.R., 26 All., 238.

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decision upon the reported case of *Jaipal Kunwar* v. *Indar Bahadur Singh* (1) It is obvious that in that case their Lordships of the Privy Council maintained the decision of the courts in India with considerable reluctance, and carefully guarded themselves against being understood to hold that the execution of a will under such circumstances as the present would afford a cause of action for a declaratory suit on the part of the nearest reversioner. It is certainly not the practice of this Court to encourage such suits, vide *Ram Bhajan and others* v. *Gurcharan* (2). The learned District Judge moreover, while purporting to follow the Privy Council ruling quoted by him, has really departed from the spirit of that ruling by interfering with the decision of the court of first instance. We think that the learned Additional Subordinate Judge was right in refusing to grant the declaration sought by the plaintiff and gave good reason for his decision. We set aside the order of the court below and restore the decree of the court of first instance dismissing the suit. The defendants-appellants will get their costs in this Court and in the lower appellate court.

Appeal decreed.

1915
April 21.

Before Mr. Justice Chamier and Mr. Justice Piggott

MUHAMMAD INAMULLAH KHAN (JUDGEMENT-DEBTOR) *v.* NARAIN DAS (DECREE-HOLDER).*

Code of Civil Procedure (1908), *order XXXVIII, rule 5, order XXXIX, rule 1, section 94—Injunction—Malikana dues.*

One M.I., mortgaged *malikana* dues from certain villages to one N, N sued on his mortgage and obtained an order absolute for sale of the property. Later, he obtained an injunction restraining the judgement-debtor from receiving the *malikana* dues. *Held*, that the court below was not justified in either attaching the *malikana* dues or restraining the judgement-debtor by injunction from receiving it inasmuch as all that the decree-holder was entitled to do under his decree, was to have the property sold

THE facts of this case were as follows :—

One Muhammad Inamullah Khan mortgaged his right to receive what are described as *taluqdari malikana* dues from a number of villages to one Narain Das in the year 1901. Narain Das brought a suit on foot of his mortgage and obtained

*First Appeal No. 165 of 1914, from an order of Shekhar Nath Banerji, Subordinate Judge of Agra, dated the 22nd of August 1914.

(1) (1904) I.L.R., 26 All., 238. (2) (1904) 1 A.L.J.R., 468.

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an order absolute for sale of the property on the 10th of February, 1914. In March of the same year Narain Das applied for sale of the property. Notice was issued to Muhammad Inamullah Khan, who put forward objections. His objections were dismissed and an order was made that the property should be sold. On the 10th of July, 1914, Narain Das applied to the court to issue an injunction to Muhammad Inam-ullah Khan, restraining him from receiving the *malikana* dues. The court *ex parte* made an order as prayed and issued an injunction. Objections were put forward by Muhammad Inamullah Khan, judgement-debtor, which were dismissed and the *ex parte* order of the court was maintained. The judgement-debtor appealed to the High Court against this last mentioned order.

The Hon'ble Mr. *Abdul Raoof*, for the appellant.

Pandit *Shiam Krishna Dar*, for the respondent.

CHAMIER and PIGGOTT, JJ.—This appeal arises out of an order passed in the course of proceedings taken to execute a decree dated November the 23rd, 1911. It appears that in August, 1901, the appellant mortgaged to the respondent his right to receive what are described as *taluqdari malikana* dues from a number of villages. A decree *nisi* for sale of the property was passed in favour of the respondent on November the 23rd, 1911. There was an appeal to this Court, which was dismissed in April, 1913, and an order absolute for sale of the property was passed on February the 10th, 1914. In March of the same year the respondent applied for sale of the property. Notice was issued to the appellant who put forward objections. Those objections were ultimately dismissed and an order was made that the property should be sold. On July the 10th, 1914, the respondent applied to the court to issue an injunction to the appellant restraining him from receiving the *malikana* dues. At first sight it seems to be an application under order XXXIX, rule 1, of the Code of Civil Procedure, but from certain expressions used in the application it may have been an application under order XXXVIII, rule 5, of the Code of Civil Procedure. The court *ex parte* made an order as prayed and issued an injunction. Objections were put forward, which were dismissed and the *ex parte* order of the court was maintained. This is an appeal against the last mentioned order.

As the appellant has a right of appeal whether it was an order of attachment or an order for the issue of injunction, it is unnecessary to consider whether it was passed under order XXXVIII or under order XXXIX of the Code of Civil Procedure. In appeal it is contended that the court had no power either to attach the *malikana* dues or to prevent the appellant by injunction from receiving them. It is contended that all that the respondent is entitled to do under his decree, is to have the property sold. For the respondent it is contended that it is competent to a court to attach property in a case of this kind at all events, where it is clear that in the event of the mortgaged property not realizing sufficient to satisfy the decree, a decree can be passed under order XXXIV, rule 6. We will assume, for the purposes of this appeal, that the property mortgaged will not realize sufficient to satisfy the decree. It appears to us clear that the case does not fall either within order XXXVIII, rule 5, or within order XXXIX, rule 1, of the Code of Civil Procedure There is no suggestion that the appellant is about to dispose of the whole or any part of his property, or remove it from the jurisdiction of the court, or that any property in dispute is in danger of being wasted, or that the appellant intends to remove his property with a view of defrauding his creditors. All that the appellant in the present case insists upon doing is receiving the income of the property until a sale takes place. In the last resort it is contended that the court was justified in passing the order under appeal either under clause (*c*) or clause (*e*) of section 94 of the Code of Civil Procedure. It is a question whether the clauses referred to are intended to authorise a court to grant injunctions or to make attachments in cases not provided for by the orders or rules. We may assume that it was intended to give the court powers outside the orders and rules in exceptional cases. In the present case we see no reason to take action of an extraordinary character. The order absolute for sale was not passed until February, 1914, and it cannot be said that the appellant has for any great length of time prevented the respondent decree-holder from enforcing his decree. Assuming therefore that section 94 can be construed in the way suggested by the respondent, we are not prepared to hold that the present

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case is covered by that section. It seems to us that the court below was not justified in either attaching the *malikana* dues or restraining the appellant by injunction from receiving them. We allow the appeal and set aside the order of the court below. The respondent will pay the appellant's costs of this appeal. The record should be sent back at once so that further execution may not be delayed.

Appeal allowed.

1915
April, 26.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Muhammad Rafiq.

JHANDU MAL AND ANOTHER (PLAINTIFFS) v. KARAN SINGH AND OTHERS (DEFENDANTS).*

Mortgage—Suit on lost bond—Admission of execution—Plea of payment—How far question of loss material.

In a suit brought on a lost mortgage bond the defendant, a son of the executant, admitted execution but pleaded payment and denied the loss.

Held, that since the defendant admitted execution, it lay on him to prove that the mortgage had been discharged. The question of the loss of the bond was only material for the purpose of determining whether the bond had been discharged and returned.

THE facts of this case were as follows:—

This was a suit brought by the plaintiffs-appellants to enforce a mortgage, dated the 10th of July, 1884, alleged to have been executed by two persons, namely Randhir Singh and Partap Singh.

Randhir Singh is dead and is represented by his son, Karan Singh and his daughter-in-law Musammat Radha, the widow, apparently, of a pre-deceased son. The share of Randhir Singh in the mortgaged property was sold to Chidammi Lal whose minor sons Daya Kishore and Jaikishore are the defendants Nos. 4 and 5. The defendant No. 2 is the mortgagor, Partab Singh, and defendant No. 3, Nahar Singh, is the son of Partab Singh.

Nahar Singh filed a written statement in which he said that his father Partab Singh was of unsound mind and was under the influence of the plaintiffs and that the bond had been discharged by Chidammi (the purchaser of Randhir Singh's property) and had been returned to him. He denied the allegation of loss of the bond made on behalf of the plaintiffs. Partab Singh and

* Second Appeal No. 674 of 1913, from a decree of H. W. Lyle, District Judge of Agra, dated the 11th of March, 1913, confirming a decree of Shekhar Nath Banerji, Second Additional Subordinate Judge of Agra, dated the 24th of February, 1913.

Karan Singh admitted the claim. Musammat Radha denied the bond and Musammat Chironji (the mother and guardian of the minor defendants) did not enter appearance. The court proceeded to try the suit and held that the claim was time-barred.

On appeal the District Judge disagreed with the Subordinate Judge on the question of limitation, but held that the loss of the bond had not been proved and accordingly affirmed the decision of the first court. The plaintiffs appealed to the High Court.

Munshi *Haribans Sahai*, for the appellants

Dr. *Satish Chandra Banerji*, for the respondents.

BANERJI and MUHAMMAD RAFIQ, JJ.—This appeal arises out of a suit brought by the plaintiffs-appellants to enforce a mortgage, dated the 10th of July, 1884, alleged to have been executed by Randhir Singh and Partab Singh.

Randhir Singh is dead and is represented by his son, Karan Singh and his daughter-in law Musammat Radha, the widow, apparently, of a pre-deceased son The share of Randhir Singh in the mortgaged property was sold to Chidammi Lal whose minor sons Daya Kishore and Jai Kishore are the defendants Nos. 4 and 5. The defendant No. 2 is the mortgagor, Partab Singh, and defendant No. 3, Nahar Singh is the son of Partab Singh.

The case in our opinion was not properly tried. On the first date fixed for hearing the learned Subordinate Judge dismissed the suit for default of appearance of both parties. On the same date, i.e. the 16th of September, 1911, he restored the case to its file. On that date Partab Singh and Karan Singh filed a compromise and the learned Judge proceeded to hear the case *ex parte* against the other defendants and made a decree in the terms of the compromise. Subsequently an application was made on behalf of Nahar Singh and Musammat Radha to have the *ex parte* decree made against them set aside. This application was granted and the case was re-heard It is clear that Musammat Radha has no interest in the suit. Strictly speaking Karan Singh also has no interest in the suit because the plaintiff cannot enforce the mortgage against any property other than the mortgaged property and Randhir Singh's share of the mortgaged property was sold to Chidammi and is in the possession of the minor defendants Daya Kishore and Jai Kishore.

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Nahar Singh filed a written statement in which he said that his father Partab Singh was of unsound mind and was under the influence of the plaintiffs, and that the bond had been discharged by Chidammi (the purchaser of Randhir Singh's property) and had been returned to him. He denied the allegation of loss of the bond made on behalf of the plaintiffs. Partab Singh and Karan Singh admitted the claim. Musammat Radha denied the bond and Musammat Chironji (the mother and guardian of the minor defendants) did not enter appearance. The court proceeded to try the suit, and held that the claim was time-barred.

This finding on the question of limitation was, as the lower appellate court has held, erroneous in view of the rulings of this Court. The learned Subordinate Judge, however, also tried the other issues framed by him. He was of opinion that the loss of the bond was not proved, and that the bond had been discharged. He accordingly dismissed the suit. Upon appeal the learned District Judge, as we have said above, disagreed with the learned Subordinate Judge on the question of limitation, but he held that the loss of the bond had not been proved, and accordingly affirmed the decision of the first court.

It is contended on behalf of the appellants that the question of the loss of the bond was immaterial. It is said that it was Nahar Singh who denied the loss, but as he admitted the bond and only pleaded payment, the question of loss was only material for the purpose of determining whether the bond had been discharged and returned. We think this contention is valid. Nahar Singh, however, also stated that his father was of unsound mind and was under the influence of the plaintiffs. That was a question which the court of first instance ought to have tried but did not try. It was alleged that the bond had been admitted by Musammat Chironji, the mother of the minor defendants who are the real parties interested in the portion of the mortgaged property which belonged to Randhir Singh. That question also was not tried by the court of first instance. If she admitted the genuineness of the mortgage and the liability of the property for the mortgage debt that would be a strong piece of evidence in favour of the plaintiff; but it would have to be proved that she made the admission. For all these reasons we think that the case has not been

properly tried. We, accordingly, discharge the decrees of the courts below and remand the case to the court of first instance with directions to re-admit the suit under its original number and try it *de novo* after framing proper issues. Costs here and hitherto will be costs in the cause.

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Appeal decreed—Cause remanded.

REVISIONAL CIVIL.

Before Mr. Justice Piggott.

NAND KISHORE (PETITIONER) *v.* SURAJ MAL AND OTHERS (OPPOSITE PARTIES).*

1915 *April 26.*

Act No. III of 1907 (*Provincial Insolvency Act*) *section* 43.—*Receiver's report—Insufficient to base a conviction on.*

On report by a receiver of an insolvent's property to the effect, that the insolvent had fraudulently transferred certain property of his just before he was declared an insolvent, and that he had concealed the fact that he was the owner of a certain shop, the court convicted him under section 43 of the Provincial Insolvency Act. *Held,* that a receiver's reports do not constitute legal evidence upon which an order under section 43 of the said Act can be based, and therefore a conviction under section 43 based only on a receiver's report is bad in law. *Emperor* v *Chiranji Lal* (1), *Nathu Mal v. The District Judge of Benares* (2), *ex parte Campbell,* In re *Wallace* (3) referred to.

THE facts of this case were as follows:—

One Nand Kishore was declared insolvent on the 12th of August 1911. On the 12th of March, 1913, he applied for an order of discharge. The receiver made two written reports to the court on the 25th of February, 1913, and the 15th of March, 1913, respectively, in which he stated that the insolvent had made a fraudulent and fictitious gift of certain property and had fraudulently omitted certain other property from the schedule of assets filed by him. In May, 1913, an application was made asking the court to take action under section 43, clause (2) of the Provincial Insolvency Act. The grounds upon which the application was based were the fraudulent gift and the fraudulent concealment aforesaid, as well as concealment of some account books, &c. Nand Kishore was examined in connection with both the matters, namely, his

*Civil Revision No. 13 of 1915.

(1) (1914) I. L. R., 36 All., 570. (2) (1910) I. L. R., 32 All., 547.

(3) (1885) 15 Q. B. D., 213.

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application for discharge and the application against him for action under section 43, clause (2), on the 6th of June, 1913. The Court of Small Causes, which was the court exercising insolvency jurisdiction, found that there were no sufficient materials to establish the grounds of concealment of account books, &c. The court found that the receiver's reports proved the first two charges and on the 5th of July, 1913, it refused the application for discharge and sentenced Nand Kishore to one year's simple imprisonment. On appeal the District Judge maintained the conviction on the same grounds, but reduced the sentence to six months. Nand Kishore applied in revision to the High Court.

Mr. *W. Wallach* (with him Mr. *A. P. Dube*), for the applicant :—

The conviction had been based entirely on the receiver's reports. In proceedings under section 43, clause (2), the receiver's written reports were not legal evidence upon which the court could act. It was only under certain specified circumstances that a receiver's report was deemed to be evidence. Section 44, clause (4), of the Provincial Insolvency Act, provided that the receiver's report shall be deemed to be evidence, and the court may presume its correctness, only for the purposes of that section, namely, the granting or refusal of an order of discharge. For other purposes, for example, those of section 43, clause (2), the ordinary law of evidence applied and the receiver had to be called as a witness to prove the statements contained in his report and be subjected to cross-examination. In proceedings under section 43, clause (2), a formal criminal charge need not be drawn up; but the court must proceed on legally admissible evidence and not import into them materials which were deemed to be evidence only by a special rule and for a special purpose. The cases of *Emperor* v. *Chiranji Lal* (1), and *Nathu Mal* v. *The District Judge of Benares* (2), relied on by the lower court were not in point. In both of those cases there was the deposition of witnesses and other legal evidence upon which the court had proceeded. In the present case the point was not that the insolvent was not aware of the charges brought against him, but that those charges had not been established by legal evidence.

(1) (1914) I. L. R., 36 All., 576. (2) (1910) I. L. R., 32 All., 547.

Mr. *B. E. O'Conor*, for the opposite party:—

The lower court had not proceeded exclusively on the reports of the receiver. The insolvent himself was examined on oath; and there was other evidence also, namely, certain entries in the account books. The insolvent called witnesses, who were examined by the court.

[PIGGOTT, J.—As to the account books the insolvent was not confronted with the entries therein nor asked to explain them.]

It could not be said that the insolvent was in any doubt about the nature of the charges against him or that he was taken at a disadvantage. Due notice was given to his pleader of the receiver's reports and the pleader took certain objections to them. A reference to section 27, clause (4) of the Provincial Insolvency Act, would show that the receiver's report could be taken into evidence for purposes other than those mentioned in section 44; and that the report became part of the proceedings of the court. The Provincial Insolvency Act was closely modelled upon the English Bankruptcy Act and the case of *ex parte Campbell*, In re. *Wallace* (1), which was under the latter Act, was in point. The objection raised by the applicant was a very technical one and was not sufficient to call for interference in revision.

Mr. *W. Wallach*, in reply.—

In the case cited by the other side, the question was one of approving a proposed composition, for which purpose section 18 of the English Act, which corresponds to section 27 of the Indian Act, laid down that the receiver's report might be looked at. That case did not carry the admissibility in evidence of the receiver's report any further than what it was under the Indian Law. Because a certain matter was deemed to be evidence for one purpose, it did not follow that it was to be deemed evidence for another. The account books by themselves did not prove anything against the insolvent; nor was there anything in his statement upon which the conviction could be supported.

PIGGOTT, J.—In this case an appellate order by the District Judge of Cawnpore has been called up by this Court in the

(1) (1895) 15 Q. B. D., 213.

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(1) (1885) 15 Q. B. D., 213.

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exercise of the general powers of superintendence and revision conferred upon it by section 46, clause (1) of the Provincial Insolvency Act, No. III of 1907. The order is one sentencing an insolvent named Nand Kishore to undergo simple imprisonment for a period of six months under section 43 of the said Act. The allegations held to be proved against him are:—

(1) That in the year 1908, at a time when the business which he was conducting was beginning to fail he fraudulently transferred certain property by way of gift to his wife and other members of his family, (2) that in the schedule of assets submitted by him along with his application to be declared an insolvent he fraudulently concealed the existence of the property nominally transferred by him, and also the fact that he was the owner of a shop in what is known as the Kuli Bazar at Cawnpore. Nand Kishore's case was that the transfer by way of gift was made in good faith, and that the shop in the Kuli Bazar has never been his property. The finding against Nand Kishore, both in the court of first instance and in the District Court, has been mainly based upon certain reports submitted by the receiver. I hold that those reports do not constitute legal evidence for the purpose for which they have been used and I should not have taken them into account against Nand Kishore. The learned District Judge has referred to the decision of a Full Bench of this Court in a case reported under the heading *Emperor* v. *Chiranji Lal* (1). Somewhat more in point was the earlier decision of a Bench of this Court in *Nathu Mal* v. *The District Judge of Benares* (2). Neither of these precisely touch the question which has been argued before me; but there can be no doubt that an order sentencing an insolvent to undergo imprisonment must be based upon legal evidence and the depositions of witnesses whom he had an opportunity of cross-examining. The report of a receiver may be evidence for the special purpose of determining whether an insolvent is or is not entitled to an order of discharge, vide section 44 of the Act. It may also be taken into consideration by a court for certain other purposes, as for instance when considering the admissibility of a proposal for composition under section 27 of the same Act. It is not evidence for the purpose of all

(1) (1914) I. L. R., 36 All., 576. (2) (1910) I. L. R., 32 All., 547.

possible proceedings under the Act. I have examined the facts of the present case, and I am quite satisfied that there are a number of points on which the receiver might well have been cross-examined and on which Nand Kishore was fully entitled to an opportunity of cross-examining before the statements of fact embodied in his report could be accepted and acted upon as they have been done in the courts below. I do not gather from the record that either the property purporting to be transferred under the deed of gift of 1908, or the shop in the Kuli Bazar has been taken possession of by the receiver, as part of the assets of the insolvent, or made available for the satisfaction of the creditors. The learned Judge of the Small Cause Court who heard this case in the first instance would not, I am confident, have dispossessed any person whom he found in possession of this shop on the strength of the evidence which, in his opinion, justified the infliction upon Nand Kishore of a sentence of imprisonment. Yet it is a more serious matter to sentence a man to undergo imprisonment than to deprive another of his possession over a building. In the argument addressed to me, in support of the order of the District Judge, reference was made to an English case, *ex parte Campbell*, In re. *Wallace* (1). That case really bears out the view which I take of the present case. Certain reports submitted by a receiver were allowed to be taken into consideration in that case precisely as they could have been under section 27 of the Provincial Insolvency Act, No. III of 1907. But the case is no authority for the proposition that such reports could have been treated as evidence in a proceeding, the object of which was to subject an insolvent to the penal provisions of the Insolvency Act. I am unable to sustain the order of the District Court in this matter, and the only question that I have to consider is what order I should substitute for it. On a review of the entire facts of the case, I am not prepared to direct that further proceedings should be taken in this matter. I have already affirmed an order of the court below refusing Nand Kishore his discharge, and it is possible that proceedings involving further inquiry into the matters litigated in connection with the order now before me may yet have to be taken. If it be found hereafter that evidence

(1) (1885) 15 Q. B. D., 213.

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is forthcoming, such as to justify the insolvency court in taking possession, either of the shop in the Kuli Bazar or of the property purporting to be dealt with by the deed of gift of 1908, as assets belonging to Nand Kishore at the time when he was declared insolvent, and therefore available for the satisfaction of his creditors, it may be that the question of subjecting Nand Kishore to punishment for his dealings in this connection may require further consideration. Unless and until something of the sort occurs, I am not of opinion that the facts which were before the courts below were such as to justify the application of section 43 of the Provincial Insolvency Act in this case. My order is that the order of the court below is set aside and that the security which I understand Nand Kishore has furnished for his attendance, if required, is hereby discharged. I make no order as to costs.

Conviction set aside.

APPELLATE CIVIL.

Before Mr. Justice Chamier and Mr. Justice Piggott.

1915, *April* 28.

ABDUL GHAFFAR (DEFENDANT) v. NUR JAHAN BEGAM (PLAINTIFF) AND MUMTAZ-UD-DIN AND OTHERS (DEFENDANTS).*

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 62—Limitation—Succession certificate obtained by one of the heirs of a deceased person—Suit by remaining heir for recovery of her share.

A certain Mohammedan in the year 1903 obtained a succession certificate to realise debts due to his deceased uncle and realised some of those debts. In the year 1913, the widow of his brother, who had died subsequent to the death of his uncle, brought the present suit for her husband's share of the money realised. *Held*, that article 62 of the first schedule to the Indian Limitation Act, 1908, governed the suit, and as no money had been realised by the holder of the succession certificate within three years of the suit it was barred by limitation. *Amina Bibi* v. *Najm-un-nissa Bibi* (1), *Parsotam Rao Tantia* v. *Radha Bai* (2), *Masih-uddin* v. *Imtiaz-un-nissa Bibi* (3), *Mahomed Wahib* v. *Mahomed Ameer* (4), *followed. Umardaraz Ali Khan* v. *Wilayat Ali Khan* (5) *distinguished.*

* First Appeal No. 2 of 1915, from an order of Srish Chandra Basu, District Judge of Budaun, dated the 18th of November, 1914.

(1) (1915) I. L. R., 37 All., 233.
(2) (1915) I. L. R., 37 All., 318.
(3) (1915) I. L. R., 37 All., 40.
(4) (1905) I. L. R., 32 Calc., 527.
(5) (1896) I. L. R. 19 All., 169.

THE facts of this case were as follows:—

One Najm-ud-din died in the year 1901, leaving among his heirs two nephews Abdul Ghaffar and Zahir-ud-din. Abdul Ghaffar obtained in March, 1903, a succession certificate entitling him to realise certain debts due to Najm-ud-din, deceased. Zahir-ud-din died in December, 1906, and his widow, Musammat Nur Jahan Begam, succeeded to his property. In July, 1913, she brought a suit against Abdul Ghaffar for rendition of account of all sums collected by him, on the authority of the succession certificate, on behalf of all the heirs and for recovery of her deceased husband's share of those sums. In the suit it was found that Abdul Ghaffar had not received any sum within three years of the suit, and applying article 62 of the Limitation Act, the Subordinate Judge dismissed the suit as barred by limitation. On appeal the District Judge holding that article 120 applied to the case remanded the suit. The defendant appealed to the High Court.

Mr. *S. A. Haidar*, for the appellant:—

The case is governed by article 62 of the Limitation Act. Any sum of money received by the appellant by virtue of the succession certificate was money received by him for the use of all the heirs entitled to a share in it; in other words, the suit is in the form of an action for money had and received and is governed by article 62 of the Limitation Act.

[PIGGOTT, J.—What do you say to the applicability of article 123 to this case?]

It was held in the of case of *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (1) that article 123 did not apply to a case like the present, where the defendant was not a person who either as an executor or an administrator represented the estate of a deceased person and was not under a legal obligation to distribute the shares to those entitled to them. Section 10 of the Limitation Act applied to express trusts and had no application to this case. Admittedly there was no express trust. The mere fact of a man's obtaining a succession certificate did not make him a trustee. The case of *Amina Bibi* v. *Najm-un-nissa Bibi* (2) was in all respects similar to the present case. Reference was made to *Kundan Lal* v. *Bansi Dhar* (3),

(1) (1896) I. L. R., 19 All., 169.
(2) (1915) I. L. R., 37 All., 233
(3) (1880) I. L. R., 3 All., 170.

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Mahomed Wahib v. *Mahomed Ameer* (1), *Masih-ud-din* v. *Imtiaz-un-nissa Bibi* (2).

The plaintiff had treated the defendant as an agent on her behalf. No relation of principal and agent existed between Zahir-ud-din, the husband of the plaintiff and the defendant. By obtaining the succession certificate the defendant did not become an agent on behalf of the other heirs. Even assuming for argument's sake that an implied agency was created that agency terminated, under section 201 of the Contract Act, on the death of Zahir-ud-din which took place more than three years prior to this suit and therefore it is barred by article 89 of the Limitation Act. There was no renewal of agency, much less a fresh agency, between the widow of Zahir-ud-din and the defendant.

Mr. *S. M. Mir* (with him the Hon'ble Dr. *Sundar Lal*), for the respondent.—

The present case was covered by the ruling in *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (3) which lays down that article 120 of the Limitation Act, and not article 62 was applicable to a case like the present. That ruling was founded on the authority of the Privy Council ruling in the case of *Mahomed Riasat Ali* v. *Hasin Banu* (4). In that case the Privy Council laid down that there was no article of the Limitation Act, applicable to cases of this nature except *article 120.* It must be taken, therefore, that their Lordships of the Privy Council considered the question of the applicability of article 62 and held it to be inapplicable, although no express reference was made to it. The fact that the defendant, as one out of several heirs entitled to share in the assets of Najm-ud-din, obtained a succession certificate and realised monies belonging to all the heirs by virtue of it made him, to all intents and purposes, a trustee of those monies for the benefit of those heirs; and no period of limitation could bar a suit against him. He realised the monies while holding a fiduciary character. The defendant's position was at least that of an agent with regard to the other heirs, and among them, Zahir-ud-din. His position of agency continued after the death of Zahir-ud-din, with regard to the

(1) (1905) I. L. R., 32 Calc., 527.
(2) (1914) I. L. R., 37 All., 40.
(3) (1896) I. L. R., 19 All., 169.
(4) (1893) I. L. R., 21 Calc., 157.

latter's representative, namely, the plaintiff. *Gurudas Pyne* v. *Ram Narain Sahu* (1). The case in I. L. R., 3 All., 170, relied on by the appellant was not followed in the case in I. L. R., 19 All., 169.

Mr. *S. A. Haidar*, was heard in reply.

CHAMIER and PIGGOTT, JJ.:—This is an appeal against an order of remand passed by the District Judge of Budaun. The facts are that one Najm-ud-din died in July, 1901, leaving a widow Zeb-un-nissa, a brother Hamid-ud-din, and two nephews Abdur Ghaffar and Zahir-ud-din. In March, 1903, Abdul Ghaffar obtained a succession certificate in respect of the debts due to the deceased. Zahir-ud-din died in 1906, and his rights devolved directly or indirectly upon the plaintiff-respondent Nur Jahan Begam, who in July, 1913, brought the present suit against Abdul Ghaffar claiming an account of all sums received by him as holder of the succession certificate, and payment of what might be found due to her. The Subordinate Judge dismissed the suit, holding that it was governed by article 62 of the first Schedule to the Limitation Act, and was barred by that article, inasmuch as it was proved that no sum had been received by Abdul Ghaffar within three years of the suit. On appeal the District Judge held that the suit was governed not by article 62, but by article 120 and remanded the suit for trial on the merits.

The District Judge has relied upon the decision of this Court in *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (2). The facts of that case do not differ in essential particulars from the facts of the present case, except that the defendant in the present case obtained a succession certificate, whereas the defendant in that case does not seem to have done so. The court was disposed to follow the decision in *Kundan Lal* v. *Bansidhar* (3), but considered itself bound by the decision of the Privy Council in *Mahomed Ryasat Ali* v. *Hasin Banu* (4), to hold that the suit was governed by article 120. It seems to us that the decision of the Privy Council in the case mentioned had no application to the facts of the case of *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (2). The case before the Privy Council was

(1) (1884) I. L. R., 10 Calc., 860.
(2) (1896) I. L. R., 19 All., 169.
(3) (1880) I. L. R., 3 All., 170.
(4) (1893) I. L. R., 21 Calc., 157.

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ABDUL GHAFFAR v. NUR JAHAN BEGAM.

one in which the widow of one Mosheraf Ali claimed the moveable and immoveable property of her husband from a brother of the deceased who had taken possession. Their Lordships held that the claim to cash and moveables was governed by article 120. Article 62, which of course had no application to the claim for moveables, does not seem to have been mentioned at all. The cash in question had not been received from any one, but had been seized by the defendant upon his brother's death. We do not think that the decision of the Privy Council obliges us to hold that such a case as this is governed by article 120. In the recent case of *Amina Bibi* v. *Najm-un-nissa Bibi* (1), it was held that a suit like the one before us was governed by article 62. In his judgement in that case TUDBALL, J., referring to the case of *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (2), said that article 62 was not mentioned at all in the judgement in that case, but he must have overlooked the last paragraph of the judgement at page 172 of the report, where article 62 was mentioned and was held to be inapplicable on the strength of the decision of the Privy Council. The decision in the case of *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (2) is a direct authority in favour of the respondent's contention, but for the reason already stated we think that the court was wrong in supposing that the point was covered by the decision of the Privy Council.

We prefer the latter decision in the case of *Amina Bibi* v. *Najm-un-nissa Bibi* (1), which is supported by the decisions in *Parsotam Rao Tantia* v. *Radha Bai* (3), *Masih-ud-din* v. *Imtiaz-un-nissa Bibi* (4), and *Mahomed Wahib* v. *Mahomed Ameer* (5). The circumstance that the defendant-appellant held a succession certificate does not appear to us to differentiate the case from cases in which one of several heirs receives payment of a debt due to the deceased though he does not hold a succession certificate. In our opinion the Subordinate Judge was right in holding that the suit was barred by limitation. We allow this appeal, set aside the order of the District Judge and dismiss the suit with costs throughout.

Appeal decreed.

(1) (1915) I. L. R., 37 All., 233.
(2) (1896) I. L. R., 19 All., 169.
(3) (1915) I. L. R., 37 All., 318.
(4) (1915) I. L. R., 37 All., 40.
(5) (1905) I. L. R., 32 Calc., 527.

APPELLATE CRIMINAL.

1915
April 30.

Before Mr. Justice Piggott.

RAM RAJA DAT *v* SHEO DAYAL.*

Criminal Procedure Code, section 195, clause (6)—Sanction to prosecute—Power of appellate court.

An application under section 195, clause (6), of the Code of Criminal Procedure stands on a different footing from an application in revision and is analogous to an appeal. The intention of the legislature is that a court of superior jurisdiction whose jurisdiction is invoked under the above section should consider the entire matter on the merits upon a complete review of all the facts

This was an application under section 195, clause (6) of the Criminal Procedure Code. The facts will appear from the judgement.

Mr. *R K. Sorabji*, for the applicant.

Babu *Peary Lal Banerji* and Pandit *Krishna Narain Laghate*, for the opposite party

PIGGOTT, J.—This is an application under the sixth clause of section 195 of the Code of Criminal Procedure, asking this court to revoke an order passed by the Sessions Judge of Banda, sanctioning the prosecution of one Ram Raja Dat for having committed the offence of giving false evidence in a deposition made by him on the 12th of August, 1914, in the court of a Magistrate subordinate to that court. The case came before the Sessions Judge in appeal, and hence he has dealt with the application for sanction. He was fully empowered to do so; but it is worth noticing that the evidence given by Ram Raja Dat was believed and acted upon by the Magistrate who heard it. I wish also to note that I look upon an application under section 195, clause (6), as standing on a very different footing from an application in revision. The right conferred by the clause abovementioned may not be exactly a right of appeal; but it is strongly analogous to such right. I think the legislature intended that a court of superior jurisdiction whose jurisdiction was invoked under section 195, clause (6), of the Code of Criminal Procedure, should reconsider the entire matter on the merits and while allowing all reasonable weight to the opinion of the court below, should nevertheless reconsider the question of the propriety of the order

* Criminal Appeal No. 275 of 1915, from an order of Banke Behari Lal, Sessions Judge of Banda, dated the 27th of February, 1915.

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of sanction on its merits, upon a complete review of the entire facts. The proceedings out of which the matter now before me has arisen have been of considerable duration and occupied the attention of several courts.

[The judgement then proceeds to discuss fully the facts and the evidence.]

I do not think this is a suitable case for a prosecution and I revoke the order of sanction passed by the court below.

Sanction revoked.

APPELLATE CIVIL.

Before Mr. Justice Chamier and Mr. Justice Piggott.

1915
May 6.

BINDA PRASAD (OPPOSITE PARTY) *v.* RAGHUBIR SARAN AND OTHERS (APPLICANTS).*

Civil Procedure Code (1908), *Order XLVII, rule* 1—*Review of judgement—Adducing of further evidence not sufficient ground.*

An application was made to a District Judge for a review of his order that a certain property was not the property of an insolvent. The ground upon which the application was in substance made was that if another opportunity was given to the applicants they would satisfy the court that its former order was wrong. *Held,* that this was not a 'sufficient reason' for entertaining the application within the meaning of Order XLVII, rule 1 of the Civil Procedure Code.

THE facts of this case were as follows :—

In the course of certain insolvency proceedings the receiver took possession of a brick-kiln as being the property of the insolvent, Abdul Haq. The appellant filed an objection claiming a half-share as originally belonging to him as a partner of Abdul Haq and the other half-share as having been purchased by him from Abdul Haq more than three months prior to the application in insolvency. Security was furnished and the court ordered the sale of the kiln to be stayed. The respondents, who were two of the creditors, filed an application calling in question the sufficiency of the security, and asserting that the purchase by the appellant was fraudulent, and that he had no title to any part of the brick-kiln. On the 21st of January, 1915, the court released the kiln from attachment, finding that the appellant was

*First Appeal No. 27 of 1915, from an order of L. Johnston, District Judge of Meerut, dated the 10th of February, 1915.

owner of half as partner and of the other half by a valid purchase. On the 26th of January, 1915, the respondents applied for a review of this judgement on the ground that certain facts had not been brought to the notice of the court. It was not shown that there was any new and important matter, which could not have been brought to the notice of the court by the respondents at the former hearing, or that there was any mistake or error apparent on the face of the record. The Judge, however, granted the application for review on the 10th of February, 1915, and held that the appellant had no title to the brick-kiln, and ordered the sale thereof by the receiver. The objector appealed to the High Court against this order.

Babu *Harendra Krishna Mukerji* (with him Mr. *A. H. C. Hamilton*), for the appellant :—

The Judge in his order of the 21st of January, 1915, dealt with all the objections of the respondents and found on the evidence that the appellant was the owner of the whole kiln. The respondents did not make out any case for reviewing this order. No new fact which was beyond the knowledge or means of knowledge of the respondents at the date of the first order was disclosed or alleged in the application for review. There is no apparent mistake or error. The words "for any other sufficient reason" in order XLVII, rule 1, of the Civil Procedure Code are to be taken *ejusdem generis* with what precedes them. If the production of fresh matter or evidence is sought to be made the basis of a review, the circumstances under which that can be done are laid down in the first part of clause (1) of order XLVII, rule 1. If the fresh matter or evidence fail to satisfy the conditions laid down in the first part it cannot be made the basis of a review as coming under the clause, "for any other sufficient reason." It is not a proper ground for granting a review that a Judge by going through the evidence a second time might arrive at a different conclusion. *Chunder Churn* v. *Auggrodany Loodunram Deb* (1).

Babu *Sital Prasad Ghosh*, for the respondents :—

The order of the 21st of January, 1915, did not fully dispose of all the objections of the respondents. Not being a final judgement it was open to be reconsidered with a view to a complete

(1) (1876) 25 W. R., 324.

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adjudication of all the matters in dispute. The grounds upon which the review was sought came under the clause, "for any other sufficient reason." Those words have nowhere been defined. The language used is of very wide import and the intention of the Legislature was to give the widest discretionary powers to the courts to entertain an application for review upon grounds which it might deem to be sufficient. The later order of the Judge has been passed after a full and complete consideration of all the facts and circumstances of the case. The former order was more or less summary and required to be reconsidered in furtherance of the ends of justice.

CHAMIER and PIGGOTT, JJ. :—This is an appeal by leave of the court under section 46, sub-section (3) of the Provincial Insolvency Act against an order of the District Judge of Meerut, allowing an application presented by the respondents for review of a previous order, whereby the appellant's half-share in a brick-kiln had been released from attachment and declared not to be available as assets for the payment of the debts of one Abdul Haq, who had been declared an insolvent. On the 27th of June, 1914, Abdul Haq applied to be declared an insolvent and named eleven creditors, among whom were the two respondents Raghubir Saran and Badr-ud-din. On August 27th, he was adjudicated an insolvent and on September 24th, the Deputy Nazir of the court was appointed receiver. The receiver attached or took possession of the brick-kiln, whereupon the appellant objected saying that the brick-kiln was his property. He explained that it had been the property of himself and his partner Abdul Haq, and that Abdul Haq had on March 26th, 1914, transferred to him his half-share in the brick-kiln for valuable consideration. Thereupon the District Judge directed that the sale of the brick-kiln which had been ordered should be postponed. The appellant had brought a suit in the Subordinate Judge's Court for a declaration of his title as owner of the brick-kiln against Ram Chander and the insolvent. The District Judge accepted the appellant's admitted half-share in the brick-kiln as sufficient security for any loss which might result from the postponement of the sale, and thereupon the respondents Raghubir Saran and Badr-ud-din presented a petition objecting to the acceptance of Binda Prasad's

half-share as security, and alleging that the transfer of the insolvent's half-share to him was voidable and should be set aside under sections 36 and 37 of the Insolvency Act. January 19th was fixed for hearing and ultimately the case was taken up on the 21st when the District Judge rejected the petition of Raghubir Saran and Badr-ud-din and released the whole of the brick-kiln from attachment, finding that the sale by the insolvent of his half-share in the brick-kiln to Binda Prasad was valid and could not be set aside. Six days later Raghubir Saran and Badr-ud-din presented a petition to the District Judge for review of the order just mentioned. Notice was issued and the District Judge on February 10th, 1915, granted the application for review, set aside his order of January 21st and fixed a date for the further hearing of the case noting that the parties should produce evidence regarding the good faith of the transaction which had been impugned. The District Judge ordered the re-attachment of the brick-kiln and directed the receiver to sell the bricks as soon as possible and deposit the proceeds in court. It is against this order that the present appeal was filed. On the application of the appellant the sale of the bricks was postponed pending the disposal of this appeal.

On behalf of the appellant it is contended that the respondents Raghubir Saran and Badr-ud-din showed no sufficient cause for a review of the order of January 21st, 1915. It was not suggested in their petition, and it is not suggested now, that they discovered any new and important matter or evidence, which was not within their knowledge or could not have been produced by them before the order of January 21st was passed. Nor was it suggested that there was any mistake or error apparent on the face of the record. When the respondent's learned pleader was asked by this Court to state the ground on which the application for review was based, he said that a review had been asked for "for other sufficient reason" within the meaning of order XLVII, rule 1, of the Civil Procedure Code. From the application it appears to us that the ground for review, if there was a ground at all, was that if the District Judge allowed the applicants another opportunity of producing evidence they might persuade him that the view taken by him on January

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21st was erroneous. The District Judge in granting the application for review and setting aside his previous order does not say that he is satisfied that his previous order was wrong, and does not in any way indicate his reason for allowing the application beyond this that he thought that there was a case for further enquiry. It seems to us that no sufficient ground was made out for a review of the previous order. An attempt was made on behalf of the respondents to show that the question of the validity of the transfer of half of the brick-kiln was not considered by the District Judge before passing his first order; but an examination of the order shows that the District Judge did apply his mind to that very question. He refers at the beginning of his order to the application of November 19th, 1914, and says that the question is whether the transfer to Binda Prasad should be cancelled under section 36 of the Insolvency Act. It is therefore quite clear that the question was before the court and was decided upon such materials as were available, Under the circumstances we do not think that the application for review should have been allowed. We therefore allow the appeal and set aside the order of the District Judge, dated February 10th, 1915, with costs. It appears to us that the appeal has been over-valued. We fix the Vakil's fee in this Court at Rs. 50, fifty rupees, only.

Appeal allowed.

FULL BENCH.

1915
May 7.

Before Sir Henry Richards, Knight, Chief Justice, Justice Sir Pramada Charan Banerji and Mr. Justice Tudball.

BRIJ KUMAR LAL AND OTHERS (DEFENDANTS) v. SHEO KUMAR MISRA AND OTHERS (PLAINTIFFS) AND MOHAR LAL AND ANOTHER (DEFENDANTS).*

Act No. XII of 1881 (*North-Western Provinces Rent Act*)—*Mortgage of occupancy holding—Relinquishment—Rights of Mortgagee.*

An occupancy tenant mortgaged his occupancy holding at a time when the Rent Act of 1881 was in force. In the year 1911, he entered into an agreement with his zamindars to relinquish his rights with the object of defeating the rights of the mortgagee—*Held*, that the relinquishment was ineffectual as against the mortgagee. *Jaigopal Narain Singh* v. *Uman Dat* (1) approved.

* Second Appeal No. 143 of 1914, from a decree of B. J. Dalal, District Judge of Benares, dated the 18th of September, 1913, reversing a decree of Rup Kishan Aga, Munsif of Jaunpur, dated the 28th of February, 1913.

(1) (1911) 8 A. L. J. R., 695.

THE facts of this case were as follows:—

Prior to the passing of the Agra Tenancy Act, 1901, defendants 2 and 3 made a mortgage of their occupancy holding to the plaintiffs. Afterwards they relinquished their occupancy rights in favour of the zamindar who brought a suit in the Revenue Court for the ejectment of the plaintiffs. During the pendency of that suit the plaintiffs brought the present suit in the Civil Court for a declaration of their right to remain in possession. The suit was defended upon the ground, among others, that the Civil Court had no jurisdiction to entertain the suit. The court of first instance dismissed the suit upon this ground, but the lower appellate court reversed that decree. The defendants appealed to the High Court.

Babu *Pearelal Banerji* (for Munshi *Gulzarilal*), for the appellants:—

The Civil Court had no jurisdiction to entertain the suit. Under the old Rent Act a tenant could mortgage his occupancy rights and the mortgagee therefore stepped into his shoes and should be treated as tenant. A suit was brought against the mortgagee for ejectment, and if the Revenue Court decreed the suit the Civil Court had no jurisdiction to deal with the same matter. The decree of the Civil Court would not be binding on the Revenue Court and a conflict of jurisdiction should be avoided. *Chhote Lal* v. *Sheopal Singh* (1), *Jaigopal Narain Singh* v. *Uman Dat* (2), *Balwant Singh* v. *Girdhari Lal* (3), *Pahalwan Singh* v. *Satrupa Kuar* (4).

Mr. *A.P. Dube*, for the respondent, was not called upon to reply.

RICHARDS, C. J., BANERJI and TUDBALL, JJ.—The facts connected with this appeal are extremely simple. Prior to the passing of the Agra Tenancy Act an occupancy tenant purported to mortgage his occupancy tenancy. The term of the mortgage was fifty-nine years. In the year 1911, the occupancy tenant entered into an arrangement with the zamindar to relinquish his rights. The court below has found that the mortgage was for consideration and genuine. It has found that the object of the relinquishment was to defeat the mortgagee's rights. The first

(1) (1910) I. L. R., 33 All., 335.
(2) (1911) 8 A. L. J. R., 695.
(3) (1907) 5 A. L. J. R., 50.
(4) (1905) 2 A. L. J. R., 471.

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deception of some one to give the plaintiff a cause of action for damages or injunction. Advertisement alone, so long as no sale has taken place in pursuance of it, does not amount to an infringement. The reported cases on this subject, namely, infringement of trade mark, are cases in which the defendant was selling goods within the jurisdiction of the court in which the suit was brought. In this case it is not alleged that the defendant sold or even offered for sale any goods within the jurisdiction of the court at Muttra.

The Hon'ble Dr. *Tej Bahadur Sapru*, in reply :—

Neither actual sale nor exposure for sale is necessary to establish infringement. The essential foundation of the action is a representation to the public that the plaintiff's goods are the defendant's goods; the representation may or may not achieve its purpose, and it is not necessary to prove that any person has actually been deceived. *Bourne* v. *Swan and Edgar, Limited* (1), *Frank Reddaway* v. *George Banham* (2), *John Smidt* v. *F. Reddaway* and *Co.* (3) *Munna Lal Serowjee* v. *Jawala Prasad* (4).

CHAMIER and PIGGOTT, JJ.—This is an application for revision of an order of the District Judge of Agra, confirming an order of the Subordinate Judge of Muttra, directing that the plaint be returned to the plaintiff for presentation to the proper court. The suit was one by the applicant for damages on account of alleged infringement by the defendant of the applicant's trade mark. The applicant has for a considerable time been selling a medicine under the name of *Sudha Sindhu* which, we understand, means 'Ocean of Nectar' in the course of his business at Muttra. He sells chiefly on V. P.P. orders received in response to advertisements which he puts in the papers. The respondent, who

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below have held that the suit should have been brought in Gaya. They have treated it as a question of convenience rather than as a question of law. But if the applicant can show that the cause of action arose wholly or in part within the limits of the jurisdiction of the Subordinate Judge of Muttra, he is entitled to maintain his suit in Muttra. The question is whether the publication of the advertisement, by the respondent, of his medicine, *Asli Sudha Sindhu,* in papers, hand-bills and circulars published in Muttra is an infringement of the applicant's trade mark For the purpose of this application we must of course assume that the applicant is entitled to the trade mark which he claims, and that the respondent's advertisement is calculated to induce people to believe that they will get from him the applicant's medicine. No authority has been produced in support of the argument that such an advertisement cannot be an infringement of the trade mark. On the other hand several English cases have been cited which show that it has been held for some years past that a trade mark may be infringed by means of an advertisement. We think it is sufficient to refer to the decisions in *Jay* v. *Ladler* (1), *Bourne* v. *Swan and Edgar, Limited* (2), and to the injunction which was issued by the House of Lords in the case of *Frank Reddaway* v. *George Banham* (3). On the authorities we must hold that if the facts are as alleged by the applicant his trade mark has been infringed within the jurisdiction of the Subordinate Judge of Muttra. We therefore allow this application, set aside the orders of the courts below and direct that the record be returned to the court of first instance and the suit restored to the pending file to be disposed of according to law. Costs here and hereto will be costs in the cause.

Application allowed.

(1) (1888) L R., 40 Ch. D., 649. (2) (1903) L.R., 1 Ch. p. 211.
(3) (1896) L. R., A. C., 199.

1915
May 7.

Before Mr. Justice Chamier and Mr. Justice Piggott.

SARJU PRASAD (PLAINTIFF) *v.* MAHADEO PANDE AND OTHERS (DEFENDANTS).*

Act No. IX of 1887 (Provincial Small Cause Courts Act), section 35—Jurisdiction—Munsif vested with the powers of a Judge of the Court of Small Causes succeeded by one not vested with such powers—Appeal.

When a Munsif vested with the powers of a court of small causes is succeeded in office by a munsif not vested with such powers, the latter is under section 35 of the Provincial Small Cause Courts Act, bound to try the suits pending on the file as regular suits and an appeal lies against his decision *Shiam Behari Lal* v. *Kali* (1) followed, *Mangal Sen* v *Rup Chand* (2) dissented from, *Kamla Prasad* v. *Mahabal Singh* (3), *Dulal Chandra Deb* v. *Ram Narain Deb* (4), *Ram Chandra* v. *Ganesh* (5) referred to.

THE facts of this case were as follows :—

A suit was instituted in the court of a munsif who had been invested with the powers of a Judge of a Small Cause Court up to a certain pecuniary limit. The suit was registered on the Small Cause Court side. Sometime after the written statement had been filed the Munsif went on leave and was succeeded by an officer who had not been invested with the powers of a Small Cause Court. The latter officer passed an order transferring to the regular side all Small Cause Court suits which he then found pending in the court and he tried out those cases as regular suits. He dismissed the present suit. The plaintiff appealed. The Subordinate Judge before whom this appeal came up for hearing held that no appeal lay. The plaintiff filed an application for revision of that order.

Babu *Jogendra Nath Mukerji*, for the applicant.

Babu *Sital Prasad Ghose*, for the respondents.

CHAMIER and PIGGOTT, JJ.—This is an application for revision of an order of the Additional Subordinate Judge of Gorakhpur rejecting an appeal by the appellant on the ground that the suit out of which it arose was a Small Cause Court suit, and therefore no appeal lay. The facts are that the suit was instituted in the court of a Munsif who had been invested under section 25 of the Bengal, N.-W.P. and Assam Civil Courts Act, No. XII of 1887, with the

*Civil Revision No. 139 of 1914.

(1) (1914) 12 A. L. J. R., 109.
(2) (1891) I.L.R., 13 All., 324.
(3) (1903) 6 O. C., 81
(4) (1904) I. L. R., 31 Calc., 1057.
(5) (1898) I.L.R., 23 Bom., 382.

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jurisdiction of a Judge of a Court of Small Causes up to a certain pecuniary limit. The suit was registered on the Small Cause Court side. *Sometime after the written statement had been filed* the Munsif went on leave and was succeeded by an officer who had not been invested with the jurisdiction of a Judge of a Court of Small Causes. The latter officer passed an order transferring to the regular side all Small Cause Court suits which he found pending in the court and tried them out as regular suits. One of those suits was the suit out of which this application has arisen. The Munsif dismissed it and the plaintiff appealed. The Subordinate Judge purporting to follow the decision of this Court in *Mangal Sen* v. *Rup Chand* (1) has held that no appeal lay. The facts of that case are not on all fours with those of the present case, for in that case an order had been passed under section 25 of the Code of Civil Procedure of 1882, and the court was of opinion that under the last paragraph of that section the court to which a Small Cause Court suit is transferred must for the purposes of the suit be deemed to be a Court of Small Causes. It is true that the learned Judges referred also to section 35 of the Provincial Small Cause Courts Act and indicated that their opinion would have been the same whether the case was transferred under section 25 of the Code of Civil Procedure or section 35 of the Provincial Small Cause Courts Act. The decision referred to has been dissented from by the Calcutta High Court in *Dulal Chandra Deb* v. *Ram Narain Deb* (2), and also by the Bombay High Court in *Ram Chandra* v. *Ganesh* (3). In Oudh the view taken for several years past has been that which has been adopted by the Calcutta and Bombay High Courts, *vide* *Kamta Prasad* v. *Mahabal Singh* (4). In a very recent case *Shiam Behari Lal* v. *Kali* (5) MR. JUSTICE KNOX, who was one of the Judges, who took part in the decision of the case of *Mangal Sen* v. *Rup Chand* (1), held that in a case of this kind the officer who succeeded the officer before whom the suit was filed was bound to try such a suit as this as a regular suit. A decree had been passed in the form of Small Cause Courts decree.

(1) (1891) I.L.R., 13 All., 324 (3) (1893) I.L.R., 23 Bom., 382.

(2) (1904) I.L.R., 31 Calc., 1057. (4) (1903) 6 O. C., 81.

(5) (1914) 12 A. L. J. R., 109.

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MR. JUSTICE KNOX held that the unsuccessful party had been prejudiced by the procedure adopted inasmuch as he had been deprived of the right of appeal, and he set aside the decree. The view taken in the case of *Shiam Behari Lal* v. *Kali* (1) is in agreement with the view taken by the Calcutta, Bombay and Oudh Courts and is, we think, correct. It seems to us that under section 35 of Act IX of 1887 the Munsif who tried the suit, not having been invested with the jurisdiction of a Court of Small Causes, was bound to try out the suit as a regular suit, and that there was a right of appeal against his decision. We allow this application, set aside the order of the Subordinate Judge, return the record to his court and direct that the appeal be restored to the pending file and disposed of according to law. Costs of this application will be costs in the cause.

Application allowed.

APPELLATE CIVIL.

Before Mr. Justice Chamier and Mr. Justice Piggott.

1915, *May* 10.

KASHI NATH AND ANOTHER (DECREE-HOLDERS) *v.* KANHAIYA LAL SHARMA (RECEIVER).*

Act No. III of 1907 (Provincial Insolvency Act), section 34—Decree for sale of certain property was obtained by one of the creditors—Prior to sale judgement-debtor was adjudged insolvent—Position of other creditors.

Section 34 of the Provincial Insolvency Act was intended to put the creditors of the insolvent who have not actually attached the property before the date of the order of adjudication in as good a position as creditors of the insolvent who but for his insolvency would have been entitled to a rateable distribution of the assets realised on an execution sale. Certain property was attached before judgement and a decree was subsequently obtained for its sale; but prior to a sale actually taking place the judgement-debtor was adjudged an insolvent. *Held,* that as the order of adjudicaton was passed prior to the sale of the property it must be regarded as the property of the judgement-debtor and as such was available to the general body of creditors.

THE facts of this case were as follows:—

One Kashi Nath and another brought a simple money suit in the court of the Subordinate Judge of Aligarh, against one Keshab Deo and obtained attachment before judgement of certain immoveable property of the defendant in 1909. In

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* First Appeal No. 34 of 1915, from an order of W. F. Kirton, Second Additional Judge of Aligarh, dated the 27th of January, 1915.

(1) (1898) I. L. R., 23 Bom., 382.

1911, Keshab Deo was adjudicated, by the District Judge, an insolvent. Subsequent to the attachment, but before the order of adjudication he alienated portions of the attached property by means of four sale-deeds, and another portion was sold in execution of a simple money decree of the Bombay High Court. Kashinath's suit was decreed in 1913, and in 1914 the decree-holders applied for execution by sale of the property which had been attached before judgement. The property was proclaimed for sale. Thereupon the receiver of the property of the insolvent Keshab Deo applied to the District Judge claiming the property sought to be sold as having vested in him. The District Judge granted the application and ordered the Subordinate Judge to release the property from attachment and make it over to the receiver. The decree-holders appealed to the High Court.

The Hon'ble Mr. *Abdul Raoof*, for the appellants.—

A portion of the property had been alienated by Keshab Deo before his adjudication as an insolvent. It was no longer his property at the date of the adjudication, and consequently it could not vest in the receiver. Section 64 of the Code of Civil Procedure gives certain rights to the attaching creditor alone; it cannot help the receiver. What the section provides is that private alienations are void as against the claims of the attaching creditors, namely, the appellants in this case. The alienations are not void absolutely; no person other than the attaching creditor can claim to treat the alienations as being void.

Babu *Pearey Lal Banerji*, for the respondent (receiver).—

The decree-holders are proceeding against the property treating it as the property of Keshab Deo. Unless they treat it as being his property they can have no right to proceed against it. So, their own case being that the property continues to be the property of the insolvent Keshab Deo, the receiver is entitled to claim it on behalf of the general body of the creditors. Under section 34 of the Provincial Insolvency Act the receiver is entitled to claim the benefit of the execution which the decree-holders are claiming for themselves under section 64 of the Civil Procedure Code.

The Hon'ble Mr. *Abdul Raoof*, in reply.—

The decree-holders' claiming the benefit of section 64 of the Civil Procedure Code is not tantamount to their admitting that ‹‹

of December, 1912, and that it was also void on account of the misconduct of the arbitrator. He therefore again dismissed the suit. The plaintiff again appealed against the final decree. The Additional Judge overruled the Munsif's finding that the award was not made on the 2nd of December, 1912, and framing certain new issues as to the legality of the award remitted them to the Munsif for findings. The Munsif found in favour of the award.

The Additional Judge, accepted those findings and passed a decree in favour of the plaintiff in accordance with the award. The defendant applied in revision to the High Court. The application came on for hearing before Chamier, J., who referred it to a bench of two Judges.

Munshi *Jang Bahadur Lal*, for the applicant.

The Munsif having set aside the award by his order, dated the 26th of November, 1913, on the ground that it had not been made within the time allowed by the court and that it was void on account of the misconduct of the arbitrator, no appeal lay to the Additional Judge against that order and his order setting aside the Munsif's order was *ultra vires* and should be set aside. He relied on paragraph 15, schedule II to the Code of Civil Procedure, *Ganga Prasad* v. *Kura* (1), *Kalyan Das* v. *Pyare Lal* (2).

The intention of the Legislature was that all questions relating to the validity or invalidity of the award should be decided by the court making the reference and not by an appellate court; *Lutawan* v. *Lachya* (3), *Sumirta* v. *Musammat Ganesha* (4).

[TUDBALL, J.—Could not the plaintiff under section 105 of the Civil Procedure Code take exception to the interlocutory order of the Munsif setting aside the award in his appeal against the final decree?]

The plaintiff could not have done so because in that case it would be necessary for him to show that the order affected the decision of the case on the merits; *Chintamony Dassi* v. *Raghoonath Sahoo* (5), *Gulab Kunwar* v. *Thakur Das* (6), *Sankali* v. *Murlidhar* (7).

(1) (1906) I. L. R., 28 All., 403
(2) (1907) 4 A. L. J. R., 256.
(3) (1913) I. L. R., 36 All., 69.
(4) (1912) 16 I. C. (Oudh) 595 at p. 596.
(5) (1895) I. L. R., 22 Calc., 981.
(6) Weekly Notes, 1902, p. 136.
(7) (1890) I. L. R., 12 All., 200.

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decisions of this Court beginning with the Full Bench decision in *Nanak Chand* v. *Ram Narain* (1) and ending with the decision of KNOX and GRIFFIN, JJ., in *Ram Jiwan* v. *Nawal Singh* (2), with the decision of the Bombay High Court in *Damodar Trimbak Dharap* v. *Raghunath Hari* (3), and with a long string of cases in the Madras High Court ending with *Achuthayya* v. *Thimmayya* (4). It seems to us that an order of a court setting aside the award of an arbitrator and deciding that the case shall be tried by the court is an order affecting the decision of the case within the meaning of section 105 of the Code. It has been held that the words "affecting the decision of the case" in section 105, mean "affecting the decision of the case on the merits," but even so we think that the order of the Munsif setting aside the award was liable to be challenged in appeal against the decree. As long ago as 1870 SIR R. COUCH, C. J. and KEMP, J., held that such an order affected the decision on the merits, see *Mathooranath Tewaree* v. *Brindaban Tewaree* (5). The weight of authority is clearly against the applicant and we are of opinion also that the order of the Munsif was liable to be challenged in the appeal against the decree. It is not suggested that there is any other ground upon which we could in revision interfere with the order of the learned Additional Judge. This application is dismissed with costs.

Application dismissed.

APPELLATE CIVIL

1915
May, 13.

Before Sir Henry Richards, Knight, Chief Justice and Justice Sir Pramada Charan Banerji.

PHUL KUAR (PLAINTIFF) *v.* HASHMATULLAH KHAN AND ANOTHER (DEFENDANTS).*

Civil Procedure Code (1908,) *order IX, rules* 8 *and* 9.

When the plaintiff and his pleader are both absent on the day fixed for the hearing of a case and the court does not intend to give them another opportunity of appearing it ought not to decide the suit on the merits but should dismiss it for default of appearance.

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*First Appeal No. 12 of 1915, from an order of Banke Bihari Lal, Subordinate Judge of Aligarh, dated the 24th of October, 1914.

(1) (1879) I. L. R., 2 All., 181.
(2) (1908) 5 A. L. J. R., 644.
(3) (1902) I. L. R., 26 Bom., 551.
(4) (1908) I. L. R., 31 Mad., 345 XIII 84 R.
(5) (1870) 14 W. R., 327.

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THE facts of this case were as follows:—

The plaintiff brought this suit to recover a sum of money due to her on foot of two mortgage deeds. One of the pleas raised in defence was that the plaintiff had not obtained a succession certificate to collect the debts. The court, after hearing the witnesses produced, adjourned the case to enable the plaintiff to obtain a succession certificate. The case had to be adjourned a number of times as there had been some unavoidable delay in obtaining the certificate.

Finally the 17th of July, 1914, was fixed. On that day neither the plaintiff nor the plaintiff's pleader appeared. The court proceeded to decide the case on the merits. It found that the bond was duly executed that the amount was due, but that the succession certificate, not having been obtained, the plaintiff was not entitled to succeed. The court made a decree dismissing the suit with costs. The plaintiff then made an application under order IX, rule 9. The learned Subordinate Judge was of opinion that order IX, rule 9, did not apply and dismissed the application with costs. It was from this order that the plaintiff appealed to the High Court.

Pandit *Lakshman Rao Dube*, for the appellants.

Babu *Girdhari Lal Agarwala*, for the respondents.

RICHARDS, C. J., and BANERJI, J. :—This is an appeal against an order refusing to entertain an application under order IX, rule 9 of the Code of Civil Procedure. The facts are as follows: The suit was a suit to recover a large sum of money alleged to be due on foot of two mortgages. One of the pleas raised by the defendant was that the plaintiff had not obtained a succession certificate to collect the debts. There seems to have been some unavoidable delay in obtaining the certificate for which the plaintiff was not responsible and the court after hearing witnesses had allowed the plaintiff time to obtain a certificate on a number of occasions. Finally the 17th of July, 1914, was fixed. On that day neither the plaintiff nor the plaintiff's pleader appeared. The court proceeded to decide the case on the merits. It found that the bond was duly executed that the amount was due, but that the succession certificate, not having been obtained, the plaintiff was not entitled to succeed. The court made a decree dismissing the suit with costs. The plaintiff then

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made an application under order IX, rule 9. The learned *Subordinate* Judge was of opinion that order IX, rule 9, did not apply and dismissed the application with costs. It is from this order that the plaintiff appeals to the High Court.

Order XVII, rule 2, provides as follows: "Where on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by order IX or make such other order as it thinks fit." In our opinion if a court intends to dispose of a case where neither the plaintiff, nor his pleader, appears on a day to which the hearing of the suit has been adjourned, it must make an order under order IX, rule 8. It is not entitled to proceed to decide the suit on the merits. It is contended that the concluding words of the rule "or make such order as it thinks fit" entitle the court to decide the case. We do not think that this is the true construction of these words. In the very next rule where it is intended that the court should decide the suit the words used are different. The court is directed to "proceed to decide the suit forthwith." In our opinion, therefore, the court below ought not to have decided the suit on the merits, but ought, if it did not intend to give the plaintiff or her pleader any other opportunity of appearing, to have dismissed the suit for "default of appearance." Had it done so, the plaintiff would have had a right to make an application under order IX, rule 9, and that application would have been decided on its merits. It is contended on behalf of the respondents that the court, rightly or wrongly, having made a decree the proper remedy was to appeal from the decree. There is considerable force in this argument. We find, however, that when the application was made to the court below, the applicant asked that the application should be treated as an application for a review of judgement. We think under the peculiar circumstances of this case and having regard to the fact that the decree of the court below was not justified by law, it ought to have treated the application as one for a review of judgement, particularly when the plaintiff's pleader asked that, that should be done. We think the justice of the present case will be met by sending back the case to the court below with directions to treat the application as one for review of judgement. It is stated

that there is already pending an application for a review of judgement in the court below. If this be the case the court can put up both matters and dispose of them at the same time. We accordingly allow the appeal, set aside the order appealed from and remand the case with directions to the court below to re-admit the application and treat it as one for review of judgement. We make no order as to costs.

Appeal decreed.

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May 17.

Before Mr. Justice Tudball and Mr. Justice Chamier.

EAST INDIAN RAILWAY COMPANY (DEFENDANTS) *v* N. K. ROY (PLAINTIFF) *

Act No IX of 1890 (Indian Railways Act) section 75—Articles of special value lost in transit—Liability of Railway Company for the loss thereof

The plaintiff who was a passenger on the defendant railway booked three packages from Howrah to Khurja. One of them contained silver and silk articles of the description mentioned in the second schedule to the Indian Railways Act as articles which must be declared, but the plaintiff did not do so. The package was lost and the plaintiff brought this suit for damages *Held*, that section 75 of Act IX of 1890 is one of general applicability to all classes of goods; and inasmuch as the plaintiff did not declare the contents of his trunk that was lost in transit the Railway Administration was freed from all liability for the loss thereof, both as regards scheduled and non scheduled articles contained therein.

THE facts of this case were as follows :—

The plaintiff travelled on the 3rd of July, 1912, as a passenger from Howrah to Khurja by the up Umballa express train on the East Indian Railway. He had three parcels of luggage: two bundles and a steel trunk. These were weighed and delivered by him to the Railway administration and placed in the luggage van. Only two bundles were delivered at the end of his journey. The steel trunk was lost. It contained some silk and silver articles. But at the time the luggage was booked he had not declared the nature of the contents. He brought this suit to recover Rs. 416-8-0 the value of the box and its contents plus Rs. 40 by way of damage from the Railway Company. Both the courts below decreed the plaintiff's suit. The defendant company appealed to the High Court.

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* Second Appeal No. 469 of 1914, from a decree of A W. R. Cole, First Additional Judge of Aligarh, dated the 20th of March, 1914, confirming a decree of Prem Behari, Munsif of Khurja, dated the 29th of November, 1913.

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EAST INDIAN RAILWAY COMPANY v. N. K. ROY.

Mr. *W. Wallach*, for the appellant :—

Section 75 is a general section referring to all goods whether booked when a passenger is travelling in the train or whether despatched without a passenger. It qualifies section 74 as was pointed out in *Velayat Hossein* v. *B.N.-W. Railway Co.* (1). The view that parcels and packages were wide enough to cover all sorts of goods or luggage as long as the same were handed over to the Railway Company for transmission was upheld in the only two reported cases from the Punjab, *Aiwaz* v. *Simla Kalka Railway* (2), *Muhammad Abdul Ghaffar* v. *Secretary of State for India* (3). The Company therefore is not liable for damages.

Dr. *Surendro Nath Sen* (for Dr. *Satish Chandra Banerji*), for the respondent.

The Railway administration is under section 72 of Act IX of 1890, subject to the liabilities of a bailee as set out in the Contract Act with respect to 'goods' delivered to it, subject to the other provisions of the Act. The term 'goods' includes inanimate things of every kind and is sub-divided into (1) passenger's luggage and (2) parcels and packages. Section 74 coupled with section 72 deals with the responsibility of the Railway Administration as to passenger's luggage. Section 75, lays down the responsibility as to any parcel or package belonging to a non-passenger, of a value exceeding one hundred rupees delivered to a Railway Administration for carriage by rail. The legislature has marked and emphasised the distinction by the use of suitable words such as "luggage belonging to or in charge of passenger" in section 74 and of parcel or package in section 75. The two terms must be taken to denote different objects. This is one of the cardinal rules of interpretation. If section 75 be held to apply to passenger's luggage, section 74 becomes superfluous and without meaning as to part at any rate. A passenger 'books' his luggage whether he keeps it in his charge, or not. If he keeps it in his charge he does not deliver it, nor is he required to declare the value and contents of it. For the loss of the luggage while in the charge of the passenger, the railway is liable under section 74 and section 75 can never apply to such

(1) (1909) I.L.R., 36 Calc., 819. (2) (1907) P.R., 73.

(3) (1897) P.R., 56.

a loss, because it is not 'delivered' within the meaning of section 75. In places of busy traffic, it would be almost impracticable and most inconvenient for passengers to make the declaration. This may have been one of the reasons for this provision as to luggage not finding a place in section 75. The Railway administration charges certain rates for passenger's luggage and this may be taken as a consideration for insurance against loss. Sections 74 and 75 should be strictly construed and no further restrictions should be added to section 74 than were justified by the natural and grammatical meaning; *Velayat Hossein* v. *B. N. W. Railway Co.* (1).

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TUDBALL and CHAMIER, JJ.—This appeal arises out of a suit brought by the plaintiff respondent under the following circumstances: The plaintiff travelled on the 3rd of July, 1912, as a passenger from Howrah to Khurja by the up Umballa express train on the East Indian Railway. He had three parcels of luggage: two bundles and a steel trunk. These were weighed and delivered by him to the Railway administration and placed in the luggage van. Only two bundles were delivered at the end of his journey. The steel trunk was lost. He therefore sued the Railway for Rs. 461-8-0 the value of the box and its contents *plus* Rs. 40 damages, total Rs 501. At the time the luggage was booked he did not declare the nature of the contents. According to his plaint the trunk contained besides ordinary clothing some silk articles the value of which comes to over Rs. 300 and also some silver articles of the value of about Rs. 60. These are all articles which are mentioned in the second schedule of the Railways Act. The Railway Company pleaded that as the plaintiff had not declared these articles, it, the company, was not liable in view of the terms of section 75 of the Railways Act. The courts below did not accept this plea and decreed the suit in favour of the plaintiff. The Railway Company appeals and the same point is raised before us. The point is one which is covered by the rulings to be found in the Punjab Record of 1897 No. 56 and Punjab Record of 1907 No. 73. The court below has relied on a decision of the Calcutta High Court in *Velayat Hossein* v. *Bengal and North-Western Railway Company* (1). In this case no

(1) (1909) I.L.R., 36 Calc., 819.

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question of the applicability of section 75 arose. The articles which were in dispute therein were *durries* which do not come within the second schedule of the Act. The Railway Company had sought to free itself of its liability in that case by pleading a certain rule made by itself which the court held to be in conflict with the terms of section 72 of the Act, and therefore of no force. However even in that judgement there is a remark which is in favour of the appellant before us. At page 823 the judgement runs as follows: "A rule made under the Act is not a provision of the Act, and the words have an obvious reference to section 73 relating to the carriage of animals, and to section 75 relating to the carriage of articles of special value, which are expressly framed to place certain restrictions on the full operation of section 74." It is clearly an expression of opinion that section 74 of the Act is governed by section 75. The argument on behalf of the respondent is that section 74 is the only section in the Act which governs the case of passenger's luggage, and that section 75 has nothing to do with luggage whatsoever. In our opinion there is no force in this contention. The steel trunk was no less a package or parcel because it was booked as luggage. The language of section 75 is general. It provides "When any articles mentioned in the second schedule are contained in any parcel or package delivered to a Railway administration for carriage by railway and the value of such articles in the parcel or package exceeds one hundred rupees, the Railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared or declared them at the time of the delivery of the parcel or package for carriage by railway, &c." In the present case the plaintiff delivered a package to the Railway administration for carriage by railway. That package contained articles mentioned in the second schedule of a value of over Rs. 100. The facts of the present case are clearly and distinctly within the meaning of the language of section 75 which is a section of general application to all classes of goods. In our opinion the appeal is well founded. The plaintiff having failed to declare the articles the value of which he seeks to recover, the Railway Company is

not liable for the loss of the trunk and its contents. We allow the appeal and set aside the decrees of the courts below. The plaintiff's suit will stand dismissed with costs in all courts.

Appeal decreed.

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Before Sir Henry Richards, Knight, Chief Justice, and Mr Justice Tudball.

RAM NATH (DEFENDANT). v HARANI (PLAINTIFF) AND JHUNARI AND OTHERS (DEFENDANTS) *

1915 *May 19.*

Act No. II of 1903 (Bundelkhand Alienation Act) section 3—Equity of redemption sold and pre-empted—Sale of mortgagor's rights—Rights of purchaser.

The policy of the Bundelkhand Land Alienation Act is to prevent persons who are not members of an agricultural tribe from acquiring property and the provisions of section 3 apply to all permanent alienations even though they are brought about by the exercise of the right of pre-emption. Property in Bundelkhand was mortgaged and subsequently the equity of redemption was sold by the owners to a certain person from whom it was pre-empted. The Collector, however, did not sanction the sale but ordered the name of the purchaser to be recorded as a usufructuary mortgagee. Later, the mortgagors sold this very property to the plaintiff. He brought this suit to redeem it from the defendant who was in possession as a prior mortgagee. *Held*, that the plaintiff had a right to redeem the property from the defendant inasmuch as the ultimate right of redemption remained in the representatives of the original mortgagor. This right they were entitled to transfer to the plaintiff.

THE facts of this case were as follows:—

Pojan and Ganesh, the predecessors-in-title of Bandar and Rani Dulaiya, defendants Nos. 4 and 5 mortgaged the property in dispute with possession to Ram Nath, defendant No. 1, appellant in this case, and one Damoder whose heirs were also made defendants. Afterwards the defendants Nos. 4 and 5, sold the equity of redemption in the property to one Jagannath. One Ramnath Kayastha, not a party to this suit, brought a suit for pre-emption and obtained a decree but when he applied for mutation in his favour the Collector, acting under the Bundelkhand Land Alienation Act, 1903, refused to enter his name as purchaser of the equity of redemption, but recorded him as a usufructuary mortgagee of the equity of redemption, for twenty years. The material portion of the order was: "entry should be made in the papers to the effect that for twenty years from the 5th

* Second Appeal No. 459 of 1913, from a decree of J. H. Cuming, District Judge of Jhansi, dated the 29th of January, 1913, reversing a decree of Phul Chand Mogha, Munsif of Jhansi, dated the 31st of August, 1912.

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of October, 1909, the date of the decree, the right of redemption rests with Ram Nath Kayasth.

Subsequently the defendants Nos. 4 and 5 sold their rights in the property to the plaintiff who brought the present suit for redemption of the mortgage given to Ram Nath, defendant No. 1, and Damoder. The Mukhtar-i-am of the pre-emptor consented to the plaintiff's redeeming the property saying that his principals did not object to the plaintiff redeeming it. The defence was that the vendors had no right which they could transfer, and hence the plaintiff acquired no right to redeem. The court of first instance dismissed the suit but the lower appellate court reversed the decree. Defendant No. 1 appealed to the High Court.

Munshi *Harbans Sahai*, for the appellant:—

The Collector by his order could not nullify the decree of the Civil Court. The provisions of the Bundelkhand Land Alienation Act apply only to voluntary alienations and the present case being one of compulsory alienation they do not apply to this case. The permission of the Collector was not necessary for these alienations, and he could not therefore pass the order that the sale was to have the effect of a mortgage. After the sale to Jagannath the vendors lost their right in the property and the sale to the plaintiff did not pass any right to him. For a period of 20 years at least the right to redeem the mortgage in suit being vested in the pre-emptor, the vendor has no right to redeem and consequently his transferees also have no right to maintain this suit. Only Ram Nath pre-emptor has a right to redeem.

[TUDBALL, J.—Has not the plaintiff an interest in the property.]

He has an interest which has been postponed for twenty years. If the Collector had not interfered with the decree of the Civil Court the plaintiff would have lost all his rights. The order of the Collector therefore regulates the rights of the parties and it is that order which postpones the vendor's right to redeem. The statement of the Mukhtar-i-am of the pre-emptor does not constitute a transfer in favour of the plaintiff.

The Hon'ble Dr. *Tej Bahadur Sapru* (for Babu *Durga Charan Banerji*), for the respondents:—

THE right of pre-emption is a right of substitution. When Ram Nath Kayastha obtained a decree for pre-emption

against Jagannath Ahir, it must be taken that Jagannath's name was wiped out from the sale-deed, and that the real purchaser was Ram Nath Kayastha. Then the Collector intervened under the Bundelkhand Land Alienation Act and under section 14 converted the transfer to Ram Nath Kayastha into a usufructuary mortgage. Jagannath, the original vendee, having taken his money had no further interest left and if anybody became entitled to hold the equity of redemption by reason of the action of the Collector it was the original mortgagor's heir Therefore the original mortgagor's heir could transfer the equity of redemption to the present plaintiff. It was clear that under the order of the Collector Ram Nath Kayastha could redeem the original mortgagee and so could the original mortgagor

Munshi *Haribans Sahai* was heard in reply.

RICHARDS, C.J., and TUDBALL, J.—This appeal arises out of a suit to redeem a mortgage, dated the 18th of February, 1892. Ram Nath, the appellant, is one of the original mortgagees. He contends that the plaintiff has no right to maintain the suit. It appears that after the date of the mortgage the mortgagors sold their equity of redemption to one Jagan Nath Ahir. Ram Nath Kayastha (to whom we shall hereafter refer as " the pre-emptor ") brought a suit for pre-emption against Jagan Nath Ahir, and obtained a decree which became final When Ram Nath, the pre-emptor, applied to have his name recorded, the Collector under the provisions of Act II of 1903, made an order in November, 1910, refusing to sanction the permanent alienation in favour of the pre-emptor By a later order he pointed out that all that he could do for the pre-emptor was to make him a usufructuary mortgagee for twenty years under the provisions of section 14 of the Act. But seeing that there was already a usufructuary mortgagee in possession, he pointed out that the only way in which the pre-emptor could get possession would be by redeeming the mortgage of the 18th of February, 1892. On the 29th of January, 1912, the representatives of the original mortgagors sold the property to the plaintiff. The plaintiff then instituted the present suit, which was met by the defence that the vendors of the plaintiff had no interest left of which they could make a transfer. It seems to us that this contention is not sound.

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examined the evidence and I entirely agree with the Assistant Sessions Judge and the assessors that the two appellants were among the men who broke into the complainant's house on the night in question. Their appeals are dismissed.

Appeal dismissed.

APPELLATE CIVIL.

1915 May 20.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

ZAMIR AHMAD AND ANOTHER (DEFENDANTS) v. ABDUL RAZAQ AND OTHERS (PLAINTIFFS).*

Pre-emption—Wajib-ul-arz—Incidents of custom not recorded—Mohammadan Law.

A suit for pre-emption was brought both under the custom recorded in the wajib-ul-arz and Mohammadan Law; but the incidents of the custom were not recorded in the wajib-ul-arz—*Held*, that the rights were co-extensive. *Jagdam Sahai* v. *Mahabir Sahai*, (1) followed.

THE facts of this case are fully set forth in the judgement.

Dr. *Surendro Nath Sen*, for the appellants.

Mr. *B. E. O'Conor*, for the respondents.

RICHARDS, C.J., and TUDBALL, J.—This is an appeal arising out of a suit for pre-emption in respect of a certain zamindari situate in the village of Katra. Originally this village consisted of two mahals, one of $11\frac{3}{4}$ biswas and one of $8\frac{1}{4}$ biswas. The $8\frac{1}{4}$ biswas mahal was subsequently divided into two mahals, one of $3\frac{1}{4}$ biswas and one of 5 biswas. The 5 biswas mahal (which is now a 20 biswa mahal), belonged, one-half to the vendors and one-half to the pre-emptors. The vendors have sold their half share to a stranger. The pre-emptors brought their suit to enforce their right, alleging (*a*) in paragraph three of their plaint that the "custom of pre-emption prevailed among proprietors of the *khalsa*" as entered in the *wajib ul-arz* of the village and also (*b*) (as set out in paragraph 6 of the plaint) that directly he "got the news of the sale he fulfilled the conditions required by the Mohammadan Law for pre-emption" and called upon the defendant to transfer the pre-empted property to him for the price entered in the sale-deed. The defendants met the case first

*First Appeal No. 10 of 1914, from a decree of C. E. Guiterman, Additional Judge of Moradabad, dated the 21st of November, 1913.

(1) (1905) I. L. R. 28 All., 60.

from that point of view it is clear that the intention of the court was to maintain the attachment, for we find that when an application was made to revive the execution proceedings the court held, on the 2nd of August, 1909, that no further attachment was necessary and that the property was already under attachment. The delay which had taken place in following up the attachment is explained by the fact that an appeal was pending from the original decree in the High Court. We think the court below was wrong in holding that the property was not under attachment when the gift in favour of the judgement-debtor's mother was made. That gift having been made during the pendency of an attachment was void against the attaching creditor and the sale made by the donee falls with it. It was urged on behalf of Hayat Ali Shah that he was not a party to the original suit and that it was through an error that his name appears in the array of judgement-debtors. It is admitted that the decree for mesne profits was passed against him. We allowed him an opportunity of getting the decree amended if his statement was true, but we are informed that the application made by him has been rejected. We must hold that Hayat Ali Shah was a person against whom the decree sought to be executed was passed. We allow the appeal, set aside the decree of the court below and decree the plaintiffs' claim with costs in both courts.

Appeal allowed.

PRIVY COUNCIL.

GANGA SAHAI (DEFENDANT) v. KESRI AND OTHERS (PLAINTIFFS), 83 OF 1912, AND MUNSHI LAL AND OTHERS (PLAINTIFFS) v. GANGA SAHAI AND OTHERS (DEFENDANTS) AND MUNSHI LAL AND OTHERS (PLAINTIFFS) v. CHUNNI LAL (DEFENDANT) AND TWO OTHER APPEALS, FIVE APPEALS CONSOLIDATED, 84 OF 1912.

P. C.* 1915 June 8, 9. July, 13.

[On appeal from the High Court of Judicature at Allahabad.]

Hindu law—Succession—Mitakshara law—Succession of sapindas of same and of different degrees—Uncle of half blood opposed as heir to son of uncle of whole blood—Civil Procedure Code, 1882, sections 317 and 231—Execution of mortgage decree by one of several decree-holders—Suit by heirs of the other decree-holders against decree-holder who, after a sale subject to rights of heirs of the others, claimed and obtained sole possession.

Held (affirming the decision of the High Court) that under the Mitakshara law the preference of heirs of the whole blood to those of the half blood is

Present:—Lord SHAW, Sir GEORGE FARWELL, Sir JOHN EDGE, and Mr. AMEER ALI.

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confined to "sapindas of the same degrees of descent from the common ancestor." Where, therefore, the choice of heirs lay between sapindas of different degrees, an uncle of the half blood, as being less remote from the common ancestor, is a preferential heir to the sons of an uncle of the whole blood. *Suba Singh* v. *Sarfaraz Kunwar* (1) distinguished.

The provisions of section 317 of the Code of Civil Procedure, 1882, were designed to create some check on the practice of making so-called *benami* purchases at execution sales for the benefit of judgement-debtors, and in no way affect the title of persons otherwise beneficially interested in the purchase.

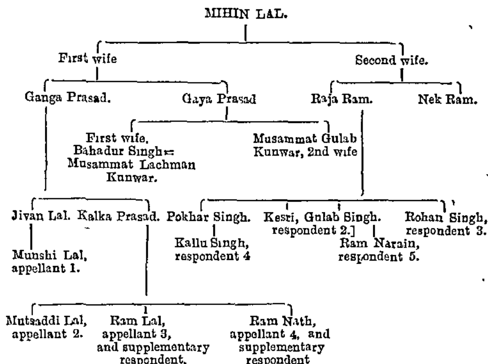
One of three joint decree-holders of a mortgage decree alone took out execution under section 231 of the Code stating that the other decree-holders had died, and praying that execution might be subject to the rights of their heirs and representatives. He obtained leave to bid at the sale, purchased the property in his own name, and furnished with a certificate of sale, got possession of the property. *Held* in a suit by the heirs of the other decree-holders for the shares they were entitled to under the decree, that section 317 of the Code was not applicable as a defence to the suit, and that the plaintiffs were entitled to recover their shares of the mortgaged property. *Bodh Singh Daodhoria* v. *Gunesh Chunder Sen* (2) followed.

CONSOLIDATED appeals, 83 and 84 of 1912, from a judgement and three decrees (9th April, 1910) and a judgement and decree (13th April, 1911) of the High Court at Allahabad, which reversed a decree (2nd January, 1906) of the District Judge of Farrukhabad, which had affirmed a decree (27th June, 1905) of the Subordinate Judge of Farrukhabad and three decrees (10th December, 1906) of the same Subordinate Judge.

The above judgements and decrees were given and passed in three suits relating to property which formed part of the estate of one Bahadur Singh, deceased, and the main issue for determination in these appeals was whether by the Mitakshara law the preferential heirs were the sons of Ganga Prasad, his father's brother of the whole blood, or his father's half brother Raja Ram.

(1) (1896) I. L. R., 19 All., 215. (2) (1873) 12 B. L. R., 317.

The relationship of the parties as to which there was no dispute is shown in the following pedigree :—



Bahadur Singh died in 1891, and Lachman Kunwar in 1894. At that date there were living Jivan Lal and Kalka Prasad, the sons of Ganga Prasad, the eldest son of Mihin Lal by his first wife who was the grandmother of Bahadur Singh, and Raja Ram, the son of Mihin Lal by his second wife. The appellants and supplementary respondents in appeal 84 are the representatives of Jivan Lal and Kalka Prasad, and the principal respondents in both appeals represent Raja Ram.

On Bahadur Singh's death his property passed to Lachman Kunwar for a widow's estate and on her death Gulab Kunwar, the step-mother of Bahadur Singh, though having no title as heir, took the property, and whilst so in possession, sold a village called Malkapur to Chunni Lal, one of the respondents in appeal 84, who entered into possession of it.

Ganga Sahai, who was one of the respondents in appeal 84 and appellant in appeal 83, was in possession of two villages Tahsipur and Bilaspur, of which on the 16th of August, 1869, one Jai Chand had executed a mortgage bond in favour of one Debi Din and Bahadur Singh for Rs. 20,000, two thirds (Rs. 13,350)

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being advanced by Debi Din, and the rest by Bahadur Singh. Debi Din died previous to 1891 leaving two sons Bhima Singh and Beni Madho. Bhima Singh had three sons, Raj Kunwar, Ganga Sahai, and Mauji Ram. In 1891 a suit on the mortgage was brought by Bahadur Singh and by Bhima and Ganga Sahai as heirs of Debi Din, in which a decree for sale was, on the 21st of November, 1891, made in favour of the heirs of Debi Din, and Lachman Kunwar, (widow of Bahadur Singh who had died during the pendency of the suit). The execution proceedings were taken out by Ganga Sahai under section 231 of the Code of Civil Procedure, 1882, and, as he stated in his application for execution "subject to the rights of the heirs of Lachman Kunwar and Bhima Singh," and in 1899 the mortgaged villages Bilaspur and Tahsipur were sold and purchased by Ganga Sahai on the 20th of February in full discharge of the amount of the decree. The sale was in due course confirmed and Ganga Sahai obtained possession of the villages on the 28th of April, 1899.

The first of the suits out of which these appeals arose was No. 3 of 1905 brought on the 5th of January of that year, in which the plaintiffs were Kalka Prasad and Munshi Lal who sued as heirs of Bahadur Singh to recover possession of the village of Malkapur from Chunni Lal. His defence was a denial that the plaintiffs were heirs of Bahadur Singh, and a claim that the title to the property was in himself as vendee from Gulab Kunwar. The Subordinate Judge decided both issues in favour of the plaintiffs, and that decision was affirmed by the District Judge on appeal. Chunni Lal preferred an appeal (second appeal 274 of 1906) to the High Court.

The second suit (44 of 1906) brought by Kalka Prasad and Munshi Lal against Ganga Sahai and the principal respondents (the descendants of Raja Ram) was to establish their title as heirs of Bahadur Singh, and to recover from Ganga Sahai one third of each of the villages (Bilaspur and Tahsipur) in his possession. And the third suit (65 of 1906) was brought on the 21st of June, 1906, by the principal respondents as the rival claimants to be the heirs of Bahadur Singh, against Ganga Sahai and Kalka Prasad and Munshi Lal to establish their claim and for a like decree for possession against Ganga Sahai.

Suits 44 and 65 of 1906 were heard together. The only issue between the rival plaintiffs was issue IV—"Who is the legal heir to Bahadur Singh, deceased?" And the only defences of Ganga Sahai material to this report were that the suit was barred by section 244 of the Code of Civil Procedure, 1882, that the villages in suit were purchased by him at the court sale exclusively for himself, and therefore the heirs of Bahadur Singh could not claim any share in them; and that even if they could, they could only sue for recovery of the money That defence was embodied in issue VI—"Whether the plaintiffs are entitled to recover a share in the disputed property, or their remedy lay in a suit for recovery of money?"

On issue IV the Subordinate Judge held that point was concluded by the decision in *Suba Singh* v. *Sarfaraz Kunwar* (1); and that in view of the observations of their Lordships in the cited case he had no doubt that the plaintiffs in the present suit (44 of 1906) would be considered nearer sapindas of Bahadur Singh than Raja Ram, by reason of Ganga Prasad and Gaya Prasad having a common mother, while Raja Ram was born of a different woman.

On issue VI the Subordinate Judge after holding that section 244 of the Code of Civil Procedure, 1882, did not apply to the suit, said:—

"It appears to me that the present suit, which is for recovery of a share in the property purchased by Ganga Sahai in his own name alone, is maintainable at law. The parties' pleaders have not been able to produce any authorities directly bearing on this point, but the equity seems to be certainly on the plaintiff's side. The purchase was made by Ganga Sahai, defendant, in the execution of a decree which he took out for the benefit of all the decree-holders and in lieu of money which belonged to all the decree-holders. So, manifestly it was made by Ganga Sahai for the benefit of all the decree-holders, and the fact that the sale certificate stands in his name alone will not make much difference. Bahadur Singh had one third share in the decretal debt, so he must possess an equal share in the property too which was acquired in lieu of that debt. Here the decretal debt was as it were transformed into the immovable property, and, therefore, Bahadur Singh in my opinion should be deemed to have the same rights in the property which he had in the decretal debt, specially when his heirs are quite willing to ratify the act of Ganga Sahai. Had the intention of Ganga Sahai been to buy the property for himself alone, he would have in that case made a deposit of the purchase money into court

(1) (1896) I. L. R., 19 All., 215.

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and not set off the decretal debt against the purchase money in only a portion of which he was interested. I, therefore, hold that as Bahadur Singh owned one third of the decretal money, his heirs are certainly entitled to get a similar share in the property. It is true it was open to the plaintiffs to sue for their money if they had chosen to do so, for it seems to me that they had two remedies open to them, but the defendant No. 1 is nobody to say that they should confine themselves to the remedy for money decree only. In my opinion the plaintiffs can sue as well for a share in the property as they could for a money decree and the present suit is, therefore, perfectly maintainable."

The Subordinate Judge, therefore, upheld the claim of Kalka Prasad and Munshi Lal in suit 44 of 1906 and made a decree for possession in their favour against Ganga Sahai, and dismissed suit 65 of 1906.

Against the decree in suit 44 two appeals were preferred to the High Court, one (appeal 63 of 1907) by Ganga Sahai and the other (appeal 57 of 1907) by the representatives of Raja Ram, the plaintiffs in suit 65 of 1906, and the same parties also preferred an appeal (58 of 1906) from the decree dismissing their suit.

These appeals, together with the appeal of Chunni Lal (second appeal 274 of 1906), were heard together by a Division Bench, and were eventually referred to a Full Bench, of the High Court (Sir GEORGE KNOX, P. C. BANERJI and H. G. RICHARDS, JJ.) who on the 9th of April, 1910, on the question of succession to the estate of Bahadur Singh, reversed the decisions of the courts below and passed decrees dismissing the suit of Kalka Prasad and Munshi Lal (44 of 1906), and allowing the claim of the representatives of Raja Ram (65 of 1906). The arguments adduced on either side and the judgement of the Court (delivered by BANERJI, J.) will be found in the report of the case of *Kesri* v. *Ganga Sahai*, Indian Law Reports, 32 All., 541.

Ganga Sahai thereupon applied for a review of judgement, the hearing of which came before the same Bench as above on the 13th of April, 1911. The grounds advanced were those which Ganga Sahai had put forward in his defence to suits 44 and 65 of 1906 before the Subordinate Judge, and which that judge had found to be not maintainable, and the High Court upheld that decision. The report of the re-hearing will be found in Indian Law Reports, 33 All., 563, where the arguments for Ganga Sahai and the decision of the High Court are given. Kalka

Prasad (whose representatives were brought on the record as appellants on his death) and Munshi Lal preferred four of the present appeals from the decrees against them of the 9th of April, 1910, and Ganga Sahai preferred an appeal from the judgement of the 13th of April, 1911. All the appeals were consolidated under an order in Council of the 2nd of December, 1914, as appeals 83 (Ganga Sahai's appeal) and 84 (the four other appeals).

The supplementary respondents were brought on the record under Orders in Council of the 10th of November, 1914, and the 3rd of February, 1915, as being the legal representatives of Mutsaddi, one of the appellants who had died.

On these appeals—

G. R. Lowndes, for the appellant Ganga Sahai in appeal 83, contended that the suits brought against him by the heirs of Ganga Prasad and the heirs of Raja Ram, respectively, were barred by section 317 of the Code of Civil Procedure, 1882, which enacted that "no suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person or on behalf of some one through whom such person claims." Section 244 of the Code was also referred to as barring the suits, and the case of *Kalka Prasad* v. *Basant Ram* (1) was cited.

De Gruyther, K. C., and *B. Dube*, for the respondents Kesri and others, heirs of Raja Ram, were not called on.

[Lord SHAW said that their Lordships were of opinion that the appeal should be dismissed; reasons to be given later]

Ross, K.C. and *Kenworthy Brown*, for Munshi Lal and others the appellants and supplementary respondents in appeal 84, contended that the representatives of Ganga Prasad were entitled to succeed as heirs to the estate of Bahadur Singh on the death of Lachman Kunwar in preference to Raja Ram and his representatives. It was submitted that heirs of the whole blood had the preference, and that there was nothing in the Mitakshara to show that those of the half blood are to be preferred as long as there remain any of those of the whole blood to inherit. The High Court had wrongly regarded the Madana Parijata as a commentary of authority on the Mitakshara; see Sarvadhakari's

(1) (1901) I. L. R., 23 All., 346.

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Hindu Law, pages 411, 655; Stoke's Hindu Law Books, pages 177, 441; *Lallubhai Bapubhai* v. *Cassibai* (1); *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar*, (2); Mitakshara, chapter II, section 3, verses 3, 4 and 5; section 4, verses 5, 6, 7 and 8; and section 5, verse 4; *Suba Singh* v. *Sarfaraz Kunwar* (3), where whole blood is given a preference over half blood; *Nachiappa Gounden* v. *Rangasami Gounden* (4); *Sham Singh* v. *Kishun Sahai* (5); *Vithalrao Krishna* v. *Ramrao Krishna* (6), and Vyavahara Mayukha, section 8, verse 16. The claim of the half blood to inherit appears only in recent Smritis; Jolly's Hindu Law, page 194. Sarvadhikari's Hindu Law, pages 437, 440 says the Mitakshara allows the half blood to succeed as between brothers only when there is no brother of the whole blood. The rule is that half blood is excluded by whole blood, and extends to all sapindas of equal degree, not only to brothers; an uncle therefore of the whole blood should be preferred to one of the half blood. No exception other than that given by the Mitakshara should be permitted. To let in a half blood brother, or a half blood uncle is clearly an exception to the rule of propinquity and common particles (which lays stress on the nearness of the son to the mother) and is at variance with the scheme of the law which brings in a paternal grandmother before a grandfather. In the case of Raja Ram there is no community of particles through the mother between him and Bahadur Singh; Manu, chapter IX, verses 212,217; and *Vithalrao Krishna* v. *Ramrao Krishna* (6), which refers to the Bengal authorities.

De Gruyther, *K. C.*, and *B. Dube*, for the respondents (the heirs of Raja Ram) in appeal 84, contended that the High Court had rightly decided that the uncle of the half blood and his descendants (these respondents) were the preferential heirs to those who though of the whole blood were more remote; Stoke's Hindu Law Books, page 427. The use of the term "brother" includes half-brother; and no brother's son can succeed in presence of brothers. Any question of the whole or half blood succeeding only arises when those claiming are in the same degree of relationship; where

(1) (1880) I. L. R., 5 Bom., 110.
(2) (1914) I. L. R., 42 Calc., 384; L. R., 41 I. A., 290.
(3) (1896) I. L. R., 19 All., 215 (217).
(4) (1914) 28 M. L.J., 1.
(5) (1907) 6 C. L. J., 190.
(6) (1899) I. L. R., 24 Bom., 317.

one of them is further removed than the other from the common ancestor, the nearest is the preferential heir; Manu, chapter IX, verse 187; Stoke's Hindu Law Books, page 427. The Mitakshara does not profess to be absolutely exhaustive; Mayne's Hindu Law, 7th edition, page 774, paragraph 569. The nearer degree excludes the more remote. See also page 777. If the Mitakshara is to be strictly adhered to, it must be shown that a nephew can succeed. The decision of the High Court, it was submitted, is correct, and should be upheld.

Ross, K. C., replied.

13th July, 1915:—The judgement of their Lordships was delivered by Mr. AMEER ALI.

These several consolidated appeals from certain decrees and judgements of the High Court of Allahābad arise out of three suits brought in the court of the Subordinate Judge of Farrukhabad. The plaintiffs in two of these suits, claiming adversely to each other to be the heirs of one Bahadur Singh, deceased, sought to recover from the appellant Ganga Sahai a one third share of the properties specified in their respective plaints, which he had purchased at a sale held in execution of a decree upon a mortgage to which reference will be made presently. The third suit was brought by Kalka Prasad, one of the plaintiffs in the above suits, to recover from the respondent Chunni Lal certain shares in mouza Malkapur belonging to the estate of Bahadur Singh which had been conveyed to him by one Gulab Kunwar, Bahadur's step-mother.

Their Lordships propose to deal first with the two suits in which Ganga Sahai was the defendant.

The mortgage bond referred to above was executed so long ago as the year 1869 by one Jai Chand Chaudhri, in favour of Bahadur Singh and Debi Din the ancestor of Ganga Sahai, hypothecating two villages named respectively Tahsipur and Bilaspur. One third of the amount advanced on this transaction admittedly belonged to Bahadur Singh, and the other two thirds to Debi Din. On default of payment by Jai Chand, a suit was brought in 1891 by Bahadur Singh in conjunction with Bhima Singh and Ganga Sahai, the heirs and representatives of Debi Din (who had died in the meantime). Bahadur Singh died

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during the pendency of the suit, and his widow, Lachman Kunwar, was brought on the record in his place. On the 21st of November, 1891, the usual mortgage decree under section 88 of the Transfer of Property Act (IV of 1882) was made by the court. This was followed on the 27th of April, 1893, by the final decree under section 89 of the Act.

It appears from the record that Lachman Kunwar died somewhere in 1894. On the 20th of December, 1897, Ganga Sahai applied for execution of the mortgage decree against the heir and representative of the mortgagor. In his application he expressly reserves the rights of Lachman Kunwar's heirs. The passage in question is important in view of the contention now raised by him. He states:

"Bhaman Singh, another decree-holder, has died a natural death. His sons, Mauji Ram and Raj Kunwar, are his heirs: but they do not join in the application, hence, under (section) 231 of the Code of Civil Procedure, this decree-holder alone makes this application, and prays that the decree may be executed, subject to the rights of the heirs of Musammat Lachman Kunwar and Bhaman Singh."

Bhaman Singh is evidently the same person as Bhima Singh.

The mortgaged properties were accordingly put up to sale on the 20th of February, 1899, and puchased by Ganga Sahai. The sale appears to have been duly confirmed and two sale certificates were issued to him in respect of Tahsipur and Bilaspur respectively, and he is admittedly now in possession of the properties.

The two sets of plaintiffs, as already stated, claim to be the heirs of Bahadur Singh adversely to each other; but as against the appellant Ganga Sahai, they seek identical relief. They say that the purchase by Ganga Sahai of the properties in question was not exclusively for himself, but for the benefit of the heirs and representatives of both mortgagees. The courts in India have upheld their contention. Ganga Sahai has appealed to this Board and takes his stand on the first clause of section 317 of the Code of Civil Procedure, 1882, which was in force when the sale took place. That clause provides as follows:—

"No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims."

In their Lordships' opinion the provisions of that section have no application to the present case. They were designed to create

some check on the practice of making what are called *benami* purchases at execution sales for the benefit of judgement-debtors, and in no way affect the title of persons otherwise beneficially interested in the purchase. An example of this will be found in the case of *Bodh Singh Dodhoria* v. *Gunesh Chunder Sen* (1) decided by this Board in 1873.

The courts in India were perfectly right in refusing to allow Ganga Sahai to perpetrate a fraud against his co-decree-holders under cover of this section. His application for execution was under section 231 of the Code, and it was made subject to their rights. Had he not even embodied this reservation in his petition, the court executing the decree would have of its own motion protected the interests of the other decree-holders. Their Lordships agree with the courts in India that the heirs and representatives of Bahadur Singh are entitled to recover from Ganga Sahai a one third of the properties purchased by him in execution of the joint mortgage decree.

The question then arises who among the two sets of plaintiffs are entitled to the inheritance of Bahadur Singh. At the time of his widow's death in 1894, when the succession passed to the collaterals, Raja Ram, his uncle by the half blood, was alive; and he claimed the properties in preference to Kalka Prasad and Jivan Lal, the sons of a full paternal uncle named Ganga Prasad. Raja Ram has since died and is now represented by his sons and grandsons, who are plaintiffs in one of the suits and respondents before this Board. Jivan Lal has also died, and his son, Munshi Lal, now stands in his place. Kalka Prasad and Munshi Lal were the plaintiffs in the second suit, and they claimed in opposition to Raja Ram to be the heirs of Bahadur Singh by virtue of their relationship to him being of the whole blood.

As the question of heirship was involved in all the three suits they appear to have been tried together; and the court of first instance held in favour of Jivan Lal and Kalka Prasad mainly on the authority of a decision of the Allahabad High Court, which, it considered, had settled the rule of succession in favour of the heirs related by the whole blood. The District Judge

(1) (1873) 12 B. L. R., 317.

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affirmed this decree. On appeal, however, to the High Court, the learned Judges explained that in their judgement in *Suba Singh* v. *Sarfaraz Kunwar* (1), on which the lower courts had relied, they had laid down no such principle as had been inferred; what they meant to decide was simply this, that under the Mitakshara the distinction of whole blood was not confined to the brother and his sons, but extends further. And on an examination of the doctrines of the Mitakshara, they held in effect that this preference of the whole blood to the half blood applied to sapindas of the same degree of descent from the common ancestor, and did not apply to persons of different degrees. They were accordingly of opinion that Raja Ram being paternal uncle of the half blood was entitled preferentially to the inheritance of Bahadur Singh to the exclusion of his cousins, although they were the sons of an uncle of the whole blood. They accordingly dismissed the claim of Munshi Lal and Kalka Prasad in their suit against Ganga Sahai and others, as also the claim of Kalka Prasad in his suit against Chunni Lal. They at the same time decreed the claim of Raja Ram's representatives against Ganga Sahai. Munshi Lal and the representatives of Kalka Prasad, who died during the pendency of the suit, have appealed to His Majesty in Council from these decrees of the High Court dismissing their claim; and the main contention advanced on their behalf is that, although the Mitakshara expressly provides for the succession of the half brother in preference to nephews of the whole blood, there is no such provision in respect of uncles; and further that as it provides for the succession of the grandmother on failure of the father and his descendants, it must follow that by the words "The uncles and their sons" Vijnaneswara meant that uncles of the whole blood and their sons should succeed in preference to the issue of another wife of the paternal grandfather. This argument, in their Lordships' opinion, would apply with equal force to the case of half brothers and the sons of brothers of the whole blood. But it is conceded that the author of the Mitakshara has expressly declared that brothers of the half blood come before nephews of the whole blood, and in principle they see no reason to differentiate between the brothers of the *propositus*

(7) (1896) I. L. R., 19 All., 215 (217).

and the brothers of his father. Having regard to the general scheme of the Mitakshara, their Lordships think that the preference of the whole blood to the half blood is confined to members of the same class, or, to use the language of the judges of the High Court in *Suba Singh* v. *Sarfaraz Kunwar* (1), to "sapindas of the same degrees of descent from the common ancestor," and that, therefore, on the death of Lachman Kunwar, Raja Ram, as uncle of the half blood, became entitled to the inheritance of Bahadur Singh to the exclusion of his cousins.

In the result all the appeals will be dismissed. Kesri and the other respondents in appeal 83 of 1912 will have all their costs from the appellant Ganga Sahai. There will be no order as to costs with regard to the other parties.

And their Lordships will humbly advise His Majesty accordingly.

Appeals dismissed.

Solicitors for Ganga Sahai: *T. L. Wilson & Co.*

Solicitors for Munshi Lal and others: *Douglas Grant.*

Solicitors for Kesri, Rohan, Kallu and Ram Narain: *Barrow, Rogers and Nevill.*

J. V. W.

BILAS KUNWAR (PLAINTIFF) *v* DESRAJ RANJIT SINGH AND OTHERS (DEFENDANTS.)

[On appeal from the High Court of Judicature at Allahabad.]

P.C.*
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June 11, 14, 15, 16
July, 13.

Benami *transaction—Hindu with wives and a Muhammadan mistress—Purchase with his own funds in name of mistress and registration of deed in her name—Property treated as his own, and no possession or use of it by mistress—Landlord and tenant—Estoppel as to denial of title by tenant—Act No. I of 1872 (Indian Evidence Act), section 116—No inference against litigant as to contents of documents he considers irrelevant—Omission of opposing litigant to put them in evidence in proper way.*

A Hindu taluqdar who had two wives and a Muhammadan mistress and had already made substantial provision for the latter, purchased a house with his own money in the name of the mistress and registered the deed also in her name He treated the house, however, as his own during his life-time, living in it, paying for repairs and taxes, and receiving rent for it when let, as did his senior widow after his death; and the mistress had no possession or use

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*Present:—Viscount HALDANE, Lord SHAW, Sir GEORGE FARWELL, Sir JOHN EDGE, and Mr. AMEER ALI.

(1) (1896) I. L. R., 19 All., 215.

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of the house. In a suit by the senior widow to eject, after due notice to quit, a tenant to whom she had let the house, whose defence was a denial of the plaintiff's title, and an assertion that he held under the Muhammadan mistress, who claimed title under the deed of sale in her name, of which she had obtained possession.

Held (reversing the decision of the High Court, and restoring that of the Subordinate Judge) that on the evidence in, and under the circumstances of the case the deed of sale was, and had remained throughout, a *benami* transaction.

The general rule in India, in the absence of all other relevant circumstances, laid down in *Dhurm Das Pandey* v. *Shama Soondri Dibiah* (1), that "the criterion in these cases is to consider from what source the money comes with which the purchase money is paid" followed.

It is open to a litigant to refrain from producing any documents which he considers irrelevant; and if the opposing litigant is dissatisfied, it is for him to apply for an affidavit of documents, and he can so obtain inspection and production of all that appear to him in such affidavit to be relevant and proper. If he fails to do so, neither he, nor the court at his suggestion, is entitled to draw any inference as to the contents of any such documents. It is for the litigant who desires to rely in the contents of documents to put them in evidence in the usual and proper way; if he fails to do so, no inference in his favour can be drawn as to the contents of them.

A tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord.

APPEAL No. 32 of 1912, from a judgement and decree (10th of May, 1910) of the High Court at Allahabad which reversed a judgement and decree (26th of August, 1908) of the Judge of the Small Cause Court, Allahabad, exercising the powers of a Subordinate Judge.

The suit out of which this appeal arose was brought by Musammat Thakurain Balraj Kunwar, the predecessor in title of the appellant, to recover possession of a house with its appurtenances and for other relief.

The plaintiff's case was that she was the owner of the house in suit, which was situated in Allahabad; that on the 15th of September, 1900, Dr. Desraj Ranjit Singh, the first defendant, hired the house from her at a rent of Rs. 63 a month which was afterwards raised to Rs. 65; that he occupied the house as her tenant, together with the other defendants who were his relatives; that on the 11th of October, 1905, the plaintiff gave the first defendant

(1) (1843) 3 Moo. I. A., 229.

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notice to quit; that two days after on the 13th of October, the first defendant obtained a deed of sale from one Musammat Jagmag Bibi and her two sons who professed to be owners of the house, but had not, in fact, any right thereto; that, denying the plaintiff's right of ownership, the first defendant turned out the plaintiff's servants, and took possession of movable property in the house which belonged to the plaintiff, who consequently brought the present suit on the 1st of December, 1905, to obtain possession of the house.

The defence was in effect a denial by the defendants of the plaintiff's title, and a denial that they were her tenants; and they contended that as they had purchased the house from its true owner the plaintiff could not maintain a suit to eject them from it.

On the first day of the hearing of the suit, when issues were settled for trial, the Subordinate Judge had recorded that the pleader for the plaintiff in reply to the court stated that "the real owner of the property in dispute was Rai Bisheshar Singh, deceased husband of the plaintiff, and that the name of Musammat Jagmag Bibi was fictitiously entered in the sale-deed; that Musammat Jagmag Bibi never held possession by virtue of the sale-deed, and the plaintiff's husband and the plaintiff were in possession."

Of the issues settled the following only were now material, "(5) whether the plaintiff or Musammat Jagmag Bibi is the real owner of the house, and the movables in dispute? (6) Whether the house in dispute was let out to defendant No. 1 by the plaintiff, and if so when? (8) What movables out of those claimed belonged to the plaintiff, and what is their value? (10) Whether the defendants Nos. 2 to 4 are bound by the acts and omissions of the defendant No. 1? (11) Whether the defendants can now deny the plaintiff's title to the house? (12) Whether the rent and mesne profits claimed are due to the plaintiff, and if so, by which of the defendants, and what is the correct amount thereof?"

After the oral and documentary evidence on behalf of the parties had been adduced, on the 9th of September, 1906, Balraj Kunwar . [illegible]

lant,

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in place "of her deceased co-widow." Objection was taken to her application by the defendants, *on the ground, inter alia*, that she was not the legal representative of Balraj Kunwar; and that the suit abated on the death of the latter. The Subordinate Judge, however, on the 14th of May, 1907, dismissed those objections, and ordered that the suit should proceed in the name of Bilas Kunwar as plaintiff, mainly on the ground that there was a right of survivorship between them, and that on the plaintiff's death her co-widow Bilas Kunwar was the person entitled to get possession of the house in dispute if it were the property of Rai Bisheshar Bakhsh Singh, and was entitled, therefore, to take her place as plaintiff.

The Subordinate Judge summed up the evidence thus in his judgement.

"On this evidence (and in the absence of any other evidence to show that the defendant paid rent for Jagmag Bibi and recognized her as his landlady), I am unable to find that the defendant was let into possession of this house by anyone other than the plaintiff or her servant. The rent was all along admittedly paid to the plaintiff and never to Jagmag Bibi or her sons, and it was the plaintiff to whom he applied for repairs.

"This house was purchased by Thakur Bisheshar Bakhsh Singh, plaintiff's husband, from his own money (vide Lala Sheombar Lal Vakil's deposition) which he had borrowed from Lala Manohar Das, deceased.

"*After the purchase Rai Bisheshar Bakhsh Singh remained in possession.* He used to live in it. His wife Balraj Kunwar used to live in it and he used to let it out on rent and realize the rent. After his death this house was always in the possession of his widow Balraj Kunwar, and after Balraj Kunwar her co-widow Bilas Kunwar, the present plaintiff. The whole of the evidence on the record without a single exception goes to show that Rai Bisheshar Bakhsh Singh and after his death his widows were in possession of this house to the exclusion of Musammat Jagmag Bibi, mistress of Rai Bisheshar Bakhsh Singh. The house was always let out by them. They repaired it and paid the taxes and enjoyed a good part of the surplus rent. There is nothing to show that Jagmag Bibi ever got rent of this house from Rai Bisheshar Bakhsh Singh or from his widows."

He found in the result on the 6th, 10th and 11th issues that the house was let to the first defendant as alleged by the plaintiff, and that neither the first defendant, nor the other defendants could in the circumstances of the case, deny her title to it; and as, having regard to these findings, the plaintiff was entitled to possession of the house, he held it was unnecessary for him to give a decision on the 5th issue as to the ownership of it. On issues 8 and 12 his findings were in favour of the plaintiff.

His decree accordingly substantially decreed the plaintiff's claim.

From that decision the defendants appealed to the High Court, and the appeal came before RICHARDS and TUDBALL, JJ., who reversed the decree of the Subordinate Judge, and dismissed the suit with costs. They said in their judgement as to estoppel :—

"Even assuming that Dr. Ranjit Singh took the property as tenant from Musammat Balraj Kunwar, estoppel could only arise between Dr. Ranjit Singh and Balraj Kunwar during her life-time and her heirs after her death."

Then they observed as to the ownership of the house :—

"The real issue which we have to decide, and on which we have heard counsel of both sides at considerable length, is the question, did Bisheshar Bakhsh Singh make the purchase of the bungalow in dispute for the benefit of Jagmag Bibi, or was it a purchase for his own benefit ?

"We have come to the conclusion that it was a very natural thing for Bisheshar Bakhsh Singh to make this purchase for the benefit of Jagmag Bibi. In our opinion it would have been improbable under the circumstances that he should have purchased the bungalow in her name if he wished the property to form part of his estate. In the first place it was bound to lead to trouble after his death between Jagmag Bibi and his wives. We do not think that we should treat a purchase of this kind made by a Thakur *taluqdar*, in favour of his Muhammadan mistress in the same way as we would treat a purchase made by a Hindu in the name of a complete stranger, or in the name of one member of a joint undivided Hindu family. In our opinion the probabilities of the case are much in favour of it being the intention of Bisheshar Bakhsh Singh to benefit his mistress.

"Furthermore, the plaintiffs produced none of their books, a matter to which we attach great significance, to show that any rent was received in respect of this bungalow. It may be that if those books were produced, they would have shown that in some way the rent was credited to Musammat Jagmag Bibi or set off against some claim they had against her We have already mentioned that the name of Musammat Jagmag Bibi remained recorded in respect of this property. This fact is perhaps not very conclusive But there is one matter which is certainly not without great significance, namely, that when the defendants purchased the property in suit from Musammat Jagmag Bibi they were able to obtain from her the sale-deed in her favour and the lease under which the site of the bungalow was held. Taking all the facts into consideration, we have not the slightest hesitation in finding that when Bisheshar Bakhsh Singh purchased the property he did so with the intention that the beneficial ownership in it should rest in Musammat Jagmag Bibi. Having arrived at this finding, no other question arises. It is not disputed that any interest which Musammat Jagmag Bibi had has been acquired by the defendants. The present plaintiff Musammat Bilas Kunwar is not the heir of Musammat Balraj Kunwar, and, therefore, even if it could be held that Balraj Kunwar had then,

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as she strongly asserted, an absolute title, her estate did not vest in the present plaintiff."

On this appeal—

Sir *H. Erle Richards, K.C.*, and *Ross, K.C.*, for the appellant contended that the High Court was wrong in finding that when Bisheshar Bakhsh Singh purchased the property in suit, he did so with the intention that the beneficial ownership of it should vest in Jagmag Bibi. Balraj Kunwar's case was that the name of Jagmag Bibi was merely entered in the deed of sale *benami*, and that the real owner of the house was Bisheshar Bakhsh Singh, her deceased husband: and it was submitted that on the evidence this case had been established. On his death the property passed to his two widows, with a right of survivorship between them, but possession and the right of management on behalf of them both, was given to Balraj Kunwar. Jagmag Bibi never held possession by virtue of the sale-deed, but her husband and after his death Balraj Kunwar herself, was in possession of the property. The house was purchased with Bisheshar Bakhsh Singh's money; he received the rent of it when it was let; he paid for repairs and for the taxes, and this was done by Balraj Kunwar after his death. There was no evidence that Jagmag Bibi ever received rent of the house from Bisheshar Bakhsh Singh or his widows. Substantial provision had, previously to the purchase of this house, been made by Bisheshar Bakhsh Singh for Jagmag Bibi, of which she was in possession. It was also contended that the High Court should have held on the evidence that the first defendant took the house as a tenant of Balraj Kunwar and that he, and the other defendants, were, therefore, estopped from denying her title. Reference was made to the Evidence Act (I of 1872); Ameer Ali and Woodroffe's notes on section 116; Smith's L. C. (11th edition 1903) Vol. II, 831; *Doe d. Knight* v. *Smythe* (1); and *Bayley* v. *Bradley* (2); the principle laid down in all the cases was that the tenant must restore possession to the landlord before he could dispute his title. There was no distinction between the case of a tenant and a licensee: See *Doe d. Johnson* v. *Bagtup* (3). The defendants were also estopped from denying the title of the appellant as the surviving widow of Bisheshar Bakhsh Singh.

(1) (1815) 4 M. & S., 247. (2) (1848) 5 C. B., 396 (400).
(3) (1835) 3 Ad. & E., 188.

Section 41 of the Transfer of Property Act (IV of 1882) was also referred to.

De Gruyther, K.C., and *B. Dube*, for the respondents contended that the appellant had failed to prove that the title to the property in dispute was in Balraj Kunwar. As to the *benami* character of the purchase, it was submitted that it was made by Bisheshar Bakhsh Singh, as the High Court had found, with the intention that Jagmag Bibi should have the beneficial ownership of it. Such a transaction had no *benami* character. [Sir JOHN EDGE. Did Bisheshar Bakhsh Singh buy it for himself or for Jagmag Bibi? If he bought it for himself it was a *benami* transaction; if for Jagmag Bibi it was not.] Reference was made to parts of the evidence to show that it was purchased for Jagmag Bibi; and it was submitted that the transaction was not *benami*. All the cases as to whether a transaction is *benami* or not, turn on questions of fact, and fact only: none of them therefore can be of any authority in deciding another case. If the test is who pays the purchase money that is only a question of fact. This was a case, it was submitted, where all the evidence pointed to the probability that the house was a gift to Jagmag Bibi; and there was no evidence of any other disposition of it. She had the deed of sale in her own possession. The presumption that it was hers was mostly, if not wholly, all one way. [Mr. AMEER ALI, as to *benami* transactions, referred to *Gopeekrist Gosain* v. *Gungapersaud Gosain* (1), and Sir GEORGE FARWELL to *Naginbhai* v. *Abdulla* (2).] *Uzhur Ali* v. *Ultaf Fatima* (3); *Uman Parshad* v. *Gandharp* (4); *Raja Chandranath Roy* v. *Ramjai Mazumdar* (5); and *Thakro* v. *Ganga Prasad* (6) were cited. The High Court had rightly held that there was no estoppel on the respondents to deny Balraj Kunwar's title.

Sir *H. Erle Richards, K. C.*, replied.

1915 July 13th:—The judgement of their Lordships was delivered by Sir GEORGE FARWELL:—

This is an appeal from a judgement and decree, dated the 10th of May, 1910, of the High Court at Allahabad, which reversed a

(1) (1854) 6 Moo. I. A., 53.

(2) (1882) I. L. R., 6 Bom., 717.

(3) (1869) 13 Moo. I. A., 232.

(4) (1887) I. L. R. 15 Calc., 20 (23): L.R., 14 I.A., 127 (130).

(5) (1870) 6 B. L. R., 303: 15 W.R., P.C., 7.

(6) (1887) I.L.R., 10 All., 197 (206): L. R., 15 I.A., 29 (35).

was a *benami* transaction; a dealing common to Hindus and Muhammadans alike, and much in use in India; it is quite unobjectionable and has a curious resemblance to the doctrine of our English law that the trust of the legal estate results to the man who pays the purchase money, and this again follows the analogy of our Common Law, that where a feoffment is made without consideration the use results to the feoffor. The exception in our law by way of advancement in favour of wife or child does not apply in India [*Gopeekrist Gosain* v. *Gungapersaud Gosain* (1)] but the relationship is a circumstance which is taken into consideration in India in determining whether the transaction is *benami* or not. The general rule in India in the absence of all other relevant circumstances is thus stated by Lord Campbell in *Dhurm Das Pandey* v. *Shama Soondri Dibiah* (2):—"The criterion in these cases in India is to consider from what source the money comes with which the purchase money is paid."

On the 31st of August, 1890 the taluqdar died, and by an agreement of the 21st of March, 1894, between his two widows the possession and management on behalf of both was given to one of them, viz., Thakurain Balraj Kunwar, and she has throughout managed the property in question. Whether any acts or omissions by any of the parties after the death of the taluqdar could affect the nature of the *benami* transaction as it stood at his death it is unnecessary to consider, for their Lordships are of opinion that nothing has been given in evidence which could have any effect at all on the transactions as *benami*. The evidence given by Jagmag is quite untrustworthy, and she has not even called her sons whom she purports to vouch as actors on her behalf: the Trial Judge does not place any confidence in Roshan Lal's evidence, and his conduct certainly is open to comment. On the facts as accepted by their Lordships as the result of the evidence, all rates, rents and taxes and repairs and the ground rent of the bungalow have been paid by the Thakurain. She has had possession of the premises by her servant Bhairon, and has let them to various tenants from 1891 down to the commencement of this action, the last tenant being Dr. Ranjit Singh, to whom the plaintiff let and gave

(1) (1854) 6 Moo. I. A., 53.
(2) (1843) 3 Moo. I. A., 229.

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possession in 1900, and to whom also she gave notice to quit on the 13th of October, 1905.

On these facts their Lordships are of opinion that the transaction was and remains throughout *benami*. They are unable to agree with the opinion expressed by the High Court; they find no ground on which to treat a purchase by the taluqdar of such a property as this bungalow in the name of his Muhammmdan mistress in a manner differing from that on which a similar purchase by a Hindu in the name of a complete stranger would be treated, nor is there any ground for asserting that the probabilities of the case are in favour of an intention by the taluqdar to benefit his mistress; for the reasons stated above the exact contrary appears to their Lordships to be the case. The High Court Judges "attach great significance" to the non-production of the books showing the accounts of the general estate, and appear to draw an inference therefrom adverse to plaintiff's claim; any such inference is, in their Lordships' opinion, unwarranted. These books do not necessarily form any part of the plaintiff's case; it is of course possible that some entries might have appeared therein relating to the bungalow. But it is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied, it is for him to apply for an affidavit of documents, and he can obtain inspection and production of all that appear to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the court at his suggestion is entitled to draw any inference as to the contents of any such documents. There is no ground for any inference such as is made in the High Court that the books, if produced, would have shown rent credited to Jagmag or set off against some claim against her. They related to a different property, and the possibility of entries relating to the bungalow therein is very remote, but even if it had been greater, the court was not entitled to draw any such inferences. It is for the litigant who desires to rely on the contents of documents to put them in evidence in the usual and proper way; if he fails to do so no inference in his favour can be drawn as to the contents thereof.

The other point in the case is one of estoppel. The property was let by the plaintiff to the defendant Ranjit Singh; he was

let into possession by the plaintiff's gardener Bhairon, on her behalf and by her direction, and he regularly paid rent to her and applied to her to do all the necessary repairs; he has never given up possession to her although he duly received notice to quit, and he has denied her title. Section 116 of the Indian Evidence Act is perfectly clear on the point, and rests on the principle well established by many English cases, that a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord. The Subordinate Judge was clearly right on this point. The High Court appears to have been under some misapprehension, and counsel for the respondents have not attempted to support their judgement on this point. Their Lordships are of opinion, and will humbly advise His Majesty, that the decree of the High Court should be reversed and that of the Trial Judge should be restored, and that the respondents should pay all the costs here and below.

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Appeal allowed.

Solicitors for the appellant: *T. L. Wilson & Co*

Solicitors for the respondents: *Ranken Ford, Ford & Chester.*

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Chamier and Mr. Justice Piggott

DAMODAR DAS AND OTHERS (JUDGEMENT DEBTORS) v BIRJ LAL (DECREE HOLDER)*

1915 May, 27.

Civil Procedure Code (1908), order XLV, rule 15—Privy Council—Restoration of property alienated pending appeal to the Privy Council—Procedure.

The word 'execution' as used in order XLV, rule 15, was intended to cover a case of restitution as well as a case of enforcement of a decree for possession or the like passed for the first time in the case on an appeal to His Majesty in Council, and a person who desires to obtain execution of any kind, whether by way of restitution or otherwise, must apply in the first instance to the court indicated by rule 15.

A decree was passed by the High Court against B, who appealed to the Privy Council. During the pendency of the appeal D and others obtained possession of the property in suit from B. The Privy Council reversed the decree and B applied to the Subordinate Judge to restore him to possession of the property and filed a copy of the printed judgement of their Lordships of the

* First Appeal No 135 of 1914, from a decree of Baijnath Das, Subordinate Judge of Bareilly, dated the 9th of April, 1914.

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Privy Council in proof of the fact that the judgement of the High Court had been reversed.

Held, that the application should have been made to the High Court and the Subordinate Judge could not entertain it.

Held further that the Subordinate Judge was not entitled to take any action on the printed copy of the judgement of their Lordships of the Privy Council without proof that an order in Council had followed thereon.

THE facts of this case were as follows :—

Het Ram and others brought a suit for possession of certain property. The suit was dismissed on the 27th of November, 1907. On appeal the High Court decreed the claim on the 8th of March, 1910, and the plaintiffs executed the decree and obtained possession. The principal defendant Birj Lal appealed to the Privy Council, which, on the 9th of February, 1914, dismissed the suit and directed the plaintiffs respondents to pay the costs incurred by Birj Lal appellant in the court of the Subordinate Judge and further directed the costs of the High Court and of the Privy Council to be borne by the parties. On the 13th of March, 1914, Birj Lal made an application, purporting to be under section 144 of the Code of Civil Procedure, to the court of the Subordinate Judge for restoration of possession of the property.

With the application he filed a printed unsealed copy of the judgement of their Lordships of the Privy Council, dated the 6th of February, 1914, containing their recommendation in the usual form as to the order which should be passed in the case. Het Ram and others objected, *inter alia*, that the application seeking execution of the Privy Council decree could not be made to the court of Subordinate Judge, but that the proper course was to apply to the High Court under order XLV, rule 15, of the Code of Civil Procedure, for an order transmitting the decree to the lower court for execution; and that the printed copy of the judgement filed by Birj Lal was inadmissible in evidence and that a sealed copy of the order passed by His Majesty in Council must be filed. The Subordinate Judge overruled the objections and granted the application for restoration. Hence the appeal.

Mr. *M. L. Agarwala*, for the appellants—

The court in executing a decree of His Majesty in Council is not warranted to proceed merely on a printed judgement of the Privy Council. The printed judgement is not legal evidence;

Joy Narain Giree v. *Goluck Chunder Mytee.* (1). The printed judgement upon which the court has acted was not a copy of the order passed by His Majesty in Council, but of the recommendations of their Lordships of the Privy Council to the King. It is the final order passed by His Majesty in Council that has to be enforced and a certified copy of which is required by order XLV, rule 15, to be filed.

[PIGGOTT, J., mentioned *Juggernath Sahoo* v. *Judoo Roy Singh.* (2).

The respondent's application was in its nature one to obtain execution of the order of His Majesty in Council. The provisions of order XLV, rule 15, apply to all applications to obtain enforcement of such an order, whether by way of restitution or otherwise. The lower court has purported to act under section 144 of the Code of Civil Procedure. But in the case of orders passed by His Majesty in Council that section can come into play only after the course of action prescribed by order XLV, rule 15, has been followed. The whole of the Code of Civil Procedure does not apply to appeals to the Privy Council. It is only certain particular provisions thereof that are specially made applicable. When an application has been made under order XLV, rule 15, and the order has been transmitted to the court of first instance for execution, then, and only then, the rest of the provisions of the Code relating to execution, and among them section 144, comes into play. Section 144 cannot, therefore, be invoked in aid *until the procedure laid down by order* XLV, *rule 15, has been* complied with. *Garurdhuj Prasad Singh* v. *Baiju Mal* (3). In that case, too, the relief sought to be obtained was of the nature of restoration as in the present case.

Dr. *Satish Chandra Banerji* (with him Mr. *A. E. Ryves*), for the respondent. The order passed by His Majesty in Council was that the suit be dismissed and that the plaintiffs do pay the costs incurred by Birj Lal in the first court. The only matter respecting which Birj Lal could execute that order was that of the costs. If he wanted to recover those costs it would, no doubt, be necessary for him to apply under order XLV, rule

(1) (1873) 20 W. R., 444 (2) (1879) I. L. R., 5 Calc., 329.
(3) (1900) I. L. R., 28 All., 337 (339).

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15, but there is no prayer about those costs in his application of 13th of March, 1914. Apart from the matter of the costs there is no decree or order which can be executed against the plaintiffs by Birj Lal, or in respect of which an application under order XLV, rule 15, can or ought to be made. The relief now sought by him is purely by way of restitution, he seeks to have the possession restored to him. There is no part of the Privy Council decree by applying to execute which Birj Lal can get possession from the plaintiffs. Section 144 of the Code of Civil Procedure clearly applies to such circumstances. Clause (2) of that section shows that the only procedure prescribed under such circumstances is an application under section 144. Applying for restoration is quite distinct from executing an appellate decree, although it may be that the applicant is entitled to restoration only by reason of that decree. Under section 583 of the former Code of Civil Procedure, no doubt, an application for restitution was treated as an application in execution of a decree. But the scope of that section has been made wider and the language altered by section 144 of the present Code so as to embrace all cases of restitution and so as to make it clear that an application for restoration is not at all an application for execution of a decree. The word "execution" does not occur at all in section 144. Order XLV, rule 15, therefore, does not apply to the case. Then, as to the non-production of a certified copy of the order in Council, it is submitted that the provisions of order XLV, rule 15, requiring the production of such copies are not mandatory but only directory; *Hurrish Chunder Chowdhry* v. *Kalisunderi Debi* (1). The object is that proper information regarding the order in Council should be supplied to the courts in India. In the present case the fact is not disputed that the decree of the High Court was upset and the suit dismissed by the Privy Council. There was no real doubt about what the order in Council was. The copy filed was one issued by His Majesty's printers in England and forwarded by Birj Lal's solicitors in England. There could be no doubt of its genuineness. The judgement of the judicial committee of the Privy Council, of which the copy was filed, was for

(1) (1882) I. L. R., 9 Calc., 482.

all practical purposes the order in Council. Even if it be held that the court ought not to have acted on an informal copy, the proceedings have been merely irregular and nothing more. Both parties were agreed as to the Privy Council having upset the High Court decree; and no failure of justice had resulted. The decree of the lower court should not be interfered with on a mere technicality like that. The provisions of section 99 of the Code of Civil Procedure applied to the case.

Mr. *M. L. Agarwala* was not heard in reply.

CHAMIER and PIGGOTT, JJ. :—This appeal and the connected appeals Nos. 246, 263, 264 and 359 of 1914 arise out of proceedings taken by Birj Lal, one of the parties to the case of *Birj Lal* v *Inda Kunwar* in connection with the order of His Majesty in Council in that case. As the report shows, there were two suits, of which one (No. 62 of 1907) was brought by Inda Kunwar for possession of a ten biswas share in a village, and the other (No. 63 of 1907) was brought by Het Ram and others for possession of the other 10 biswas share in the village. The court of first instance in suit No. 62 gave Inda Kunwar a decree for a two biswas share on certain terms and dismissed her claim for the remaining 8 biswas. Suit No. 63 was dismissed by the Subordinate Judge. On appeal this Court passed decrees in favour of the plaintiffs in both suits. Birj Lal, a defendant in both suits, appealed to His Majesty in Council. The two appeals were consolidated in an order by His Majesty in Council, dated the 9th of February, 1914. On the 13th of March, 1914, Birj Lal presented an application to the court of first instance in suit No. 62 praying that he might be restored to possession of the ten biswas share pending the taking of certain accounts ordered by their Lordships of the Privy Council. In the same suit he presented two applications for repayment of costs which had been recovered from him by Inda Kunwar and a third application, the nature of which need not be specified. In suit No. 63 Birj Lal applied to the Subordinate Judge to restore him to the possession of the ten biswas share, inasmuch as the suit of Het Ram and others had been dismissed by their Lordships of the Privy Council. Birj Lal presented with his application a printed copy of the judgement of their Lordships of the Privy Council containing their recommendation in the usual form as to the order which

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should be passed in the case. But he did not file any copy at all of the order in Council. His opponents at once objected that he was not entitled to apply to the Subordinate Judge without first presenting an application to this Court under order XLV, rule 15, of the Code of Civil Procedure, and they professed complete ignorance of the terms of the order of their Lordships of the Privy Council. They pleaded that the printed copy produced by Birj Lal could not be admitted in evidence and, even if admitted, could afford no justification for disturbing their possession. The Subordinate Judge threw out all their objections. Hence these appeals.

Order XLV, rule 15, provides that whoever desires to obtain execution of any order of His Majesty in Council shall apply by petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to be executed, to the court from which the appeal to His Majesty was preferred, and such court is required to transmit the order of His Majesty in Council to the court which passed the first decree appealed from, or to such other court as His Majesty in Council by such order may direct, and shall (upon the application of either party) give such directions as may be required for the execution of the same. It is contended, first, that order XLV, rule 15, does not apply at all to the case of a person who is entitled to restitution of the kind described in section 144 of the Code, and, secondly, that even if a person entitled to such restitution may make an application under order XLV, rule 15, he is not obliged to do so, and he may go direct to the court of first instance under section 144. We are unable to accept either of these contentions. It appears to us that in the absence of order XLV, rule 15, there would be nothing to show what court in India is to carry out an order of His Majesty in Council. We think that the word, 'execution' in order XLV, rule 15, is intended to cover execution of any kind, that is to say, that it covers the case of restitution as well as the case of enforcement of a decree for possession or the like passed for the first time in the case on an appeal to His Majesty in Council, and that a person who desires to obtain execution of any kind, whether by way of restitution or otherwise, must apply, in the first instance, to the court indicated by rule

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15. In the present case that was this Court. Further, we are of opinion that the Subordinate Judge was not entitled to take any action on the printed copy of the judgement of their Lordships of the Privy Council without proof that an order in Council had followed thereon; for what has to be enforced or executed is not the judgement or recommendation of their Lordships, but the order in Council. The result is that appeals Nos. 135, 363 and 264 are allowed and Birj Lal's applications are dismissed with costs in both courts. Appeals Nos. 246 and 359 are dismissed with costs.

We have been informed that, since the disposal of the applications referred to above by the Subordinate Judge, an application was made by Inda Kunwar to this Court under order XLV, rule 15, Civil Procedure Code, and on her application the order of His Majesty in Council has been transmitted to the court of the Subordinate Judge in order that it may be executed. We may point out that, as the order in Council has now reached the court of the Subordinate Judge, it is open to all parties to apply to the Subordinate Judge for such relief as they may be entitled to without making any further application to this Court under order XLV, rule 15, of the Code of Civil Procedure.

Appeal decreed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball,

1915 *May*, 23.

KHAYALI RAM AND ANOTHER (DEFENDANTS) *v.* KALI CHARAN AND OTHERS (PLAINTIFFS.) *

Pre-emption—Wajib-u l-arz—Partition of village—Right of co-sharers in different mahals to pre-empt inter se.

A certain village prior to 1873 consisted of one mahal which was sub-divided into two *pattis*. The wajib-ul-arz of that year recorded a custom of pre-emption first, with near relations, then with co-sharers in the *patti* and lastly with co-sharers in the village. Subsequently the village was divided into a number of different mahals, and at the last settlement a new wajib-ul-arz was drawn up for each of the new mahals in similar terms. The plaintiff, a proprietor in the village though not a co-sharer in the mahal, brought a suit for pre-emption. *Held* that the plaintiff was no longer a co-sharer with the vendor

* Second Appeal No. 1234 of 1914, from a decree of G. C. Badhwar, District Judge of Mainpuri, dated the 18th of July, 1914, confirming a decree of Ladli Prasad, Subordinate Judge of Mainpuri, dated the 15th of May, 1913.

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and therefore had no preferential right as against the vendor who was grove-holder in the village.

THE facts of this case were as follows:—

The plaintiff, not a co-sharer in the mahal in which the property sold was situate, but a proprietor in the village, brought this suit for pre-emption. In evidence he produced a wajib-ul-arz of 1873 which recorded a right of pre-emption in favour of (i) near relations (ii) co-sharers in the patti and (iii) co-sharers in the village. At that time the village was only divided into two pattis and consisted of one mahal. Later, the village was partitioned into separate mahals and each mahal had a wajib-ul-arz of its own which recorded that the old custom was to remain in force. The courts below decreed the claim. The defendants appealed to the High Court.

Babu *Girdhari Lal Agarwala*, for the appellants.

Dr. *Satish Chandra Banerji*, for the respondents.

RICHARDS, C.J., and TUDBALL, J.—This appeal arises out of a suit for pre-emption. The plaintiff is not a co-sharer in the mahal, although he is a proprietor in the village. The vendees also are not co-sharers in the same mahal. They are stated to be grove-holders in another mahal. The plaintiff adduced in evidence an entry in the wajib-ul-arz of 1873. This records that there is a right of pre-emption, first, with own brothers and nephews, then with cousins who are co-sharers, then with co-sharers in the *patti* and then with co-sharers in the village. At that time the village consisted of one mahal, which was sub-divided into two *pattis*. We may point out here that the court below has made a very important mistake. It states that the village was then divided into two mahals. The other evidence in support of the existence of the custom consisted of the wajib-ul-arz which was framed at the last settlement. By this time the village had been divided into a number of different mahals and at the time of the settlement a new wajib-ul-arz was drawn up for each of the new mahals in similar terms. In each of these wajib-ul-arzes it is recorded that the old custom should remain in force. The question is whether the plaintiff has proved by these two entries the existence of a custom which gave him a right to pre-empt this property against

the defendants, he not being a co-sharer in the same mahal. *We agree that, whatever the custom was prior to the partition,* it still continued. We have to see what that custom was. The only evidence being the entry in the wajib-ul-arz, we must look to this document in order to find out what the custom (if any) was. It is not contended in the present case that either parties are related to the vendor. Therefore that part of the wajib-ul-arz which refers to relationship may be left out of consideration. It is quite clear that the remaining part refers entirely to a custom existing between co-sharers because at that time all the proprietors in the village were *co-sharers with each other.* In the events which have happened *the plaintiff is no longer a co-sharer with the vendor.* He has ceased to have any community of interest with him. In this view it seems perfectly clear that there was no evidence of the existence of a custom *between persons who are not co-sharers.* After partition has taken place the owner in one mahal is no longer able to bring himself within the custom where the property sold is situate in the other mahal. We allow the appeal, set aside the decrees of both the courts below and dismiss the plaintiffs' suit with costs in all courts.

Appeal decreed.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1915 June, 29.

BISHESHAR DAS AND OTHERS (PLAINTIFFS) v. AMBIKA PRASAD (DEFENDANT).*

Civil Procedure Code (1908), section 73, order XXXVIII, rules 5, 8, 10; order XXI, rules 52 and 63—Effect of attachment before judgement—Property deposited in court—Decree—Priority—Suit for a declaration that attachment before judgement did not confer any title on the attaching creditor

A got certain property belonging to B attached before judgement. The property being of a perishable nature it was sold and the proceeds were deposited in court. Subsequently one C obtained a decree against B and applied for the satisfaction of his decree out of the sum of money that was lying in court A filed an objection and it was allowed by the court. After A had obtained his decree, the sum deposited in court was distributed rateably between A and C. C brought the present suit for a declaration that he was entitled to get his

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* Second Appeal No. 581 of 1914, from a decree of Gokul Prasad, Subordinate Judge of Allahabad, dated the 21st of February, 1914, reversing a decree of Sidheshwar Maitra, Munsif of Allahabad, dated the 29th of March, 1913.

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decree satisfied out of the sum which had been deposited in court. *Held*, that the effect of attachment before judgement was to prevent alienation. It did not confer any priority of title on the attaching creditor, and, therefore, the plaintiff was entitled to get his decree satisfied and the suit was maintainable. *Tikum Singh* v. *Sheo Ram Singh* (1), referred to.

THE facts of this case were as follows :—

The defendant brought a suit in the court of the Subordinate Judge for recovery of money in 1911 (No. 9 of 1911) against one Mahbub Husain and applied for attachment of his property before judgement. The property was attached, but, being of a perishable nature, was sold, and Rs. 669-9-6 were deposited in court. The plaintiffs brought a suit in the court of the Munsif against Mahbub Husain and obtained a decree before any decree was passed in favour of the defendant. On the 10th of January, 1912, the plaintiffs executed their decree and attached Rs. 627-9-6 out of Rs. 669-9-6 deposited in the court of the Subordinate Judge. On the 12th of February, 1912, on the application of the plaintiffs for execution the Subordinate Judge ordered the amount attached to be paid to the plaintiffs who made an application for withdrawal of the money they had attached. On the 26th of February, 1912, the defendant filed an objection to the effect that he had a lien on the money, and that it should not be paid to the plaintiffs. He further stated that the decree of the plaintiffs was collusive, and they were not entitled to get the money. The Subordinate Judge ordered that the money be not paid. After this, on the 10th of April, 1912, the defendant obtained a decree against Mahbub Husain, and three days later the Subordinate Judge ordered that the money in deposit in his court may be rateably distributed between the plaintiffs and the defendant. The plaintiffs brought the suit out of which the present appeal arose for a declaration that they were entitled to recover the entire amount of their decree. The court of first instance decreed the claim holding that the order of the 12th of February, 1912, gave them a prior right. The Subordinate Judge on appeal reversed the decree on the ground that the plaintiffs had no right prior to that of the defendant.

The plaintiffs appealed.

Pandit *Ladli Prasad Zutshi*, for the appellants.

(1) (1891) I. L. R., 19 Calc., 286.

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The defendant did not trouble himself to make good any of the pleas that he took in his written statement. He only rested his case on the fact that he had obtained attachment before judgement and claimed precedence thereby. An attachment before judgement only secured the property from alienation. It conferred no title in favour of the person attaching. The effect of attachment was that after decree no fresh attachment would be necessary, *Krishnasawmy* v. *Official Assignee of Madras* (1). Both the parties were decree-holders and an order for payment of money in favour of the plaintiffs having been made before the defendant obtained his decree they were entitled to the entire amount. In fact the order amounted to a satisfaction of the decree. If, however, the defendant could show that he was entitled to rateable distribution under section 73 of the Code of Civil Procedure he would be entitled to it. But section 73 did not apply to the case. Assets were not held by the court after the order vesting the money in the plaintiffs was made. The words "before the receipt of assets' in section 73 were important. They meant assets held in execution of the decree. He also referred to order XXXVIII, rules 5 and 10, of the Code of Civil Procedure, and submitted that in order to give him a right to the money it was not necessary for the plaintiff to withdraw it.

Dr. *Surendra Nath Sen* (with him Munshi *Haribans Sahai*), for the respondent.

The money was under an attachment when the plaintiffs made their application for attachment. Order XXXVIII, rule 10, did not bar any person from applying for sale of the attached property, but made no provision for payment of the money. The court, therefore, could make no order for its payment to the plaintiffs. Moreover the order had been cancelled. The rule did not apply when the property sought to be attached was money. If it did, the formality of selling the property attached should have been gone through so as to invest the purchaser, if any, with the right to the property sold. The defendant had not obtained his decree and the attachment gave him no lien, but he had an equitable right to have the property kept *in custodia legis*. Before the plaintiffs obtained a decree the defendant had attached

(1) (1903) I. L. R., 26 Mad., 673 (678).

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the property. The plaintiffs could not nullify the effect of the attachment before judgement by their attachment; *Sewdut Roy* v. *Sree Canto Maity* (1). The court could order rateable distribution under the rule of justice, equity and good conscience. Order XXI, rule 52, expressly laid down that the court could not touch the question of attachment; *Chedi Lal* v. *Kuarji Dichit* (2). Lastly it was submitted that, section 73 not being applicable, the suit was not maintainable. A suit of a particular description was contemplated by that section, and if all the requirements were not complied with the suit would not lie; *Debee Pershad* v. *Gujadhur Ram* (3). The remedy of the plaintiffs was to apply in the execution court for recovery of the money, and, in case the court refused to pay, to apply in revision to the High Court. Order XXI, rule 63, did not give a right of suit to one of two successful decree-holders against the same judgement-debtor. It only applied when a third party claimed under an independent title.

Pandit *Ladli Prasad Zutshi* was not heard in reply.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiffs sought a declaration that they were entitled to Rs. 627-9-6 out of a sum which had been deposited in court. The facts are as follows:—Ambika Prasad brought a suit against Mahbub and others. Before judgement he attached property which belonged to Mahbub, under the provisions of order XXXVIII of the Code of Civil Procedure. The property being of a perishable nature it was sold and the proceeds were lodged in court on the 29th of March, 1911. It is out of this sum that the plaintiffs seek to be paid the amount of a decree. The plaintiffs obtained their decree on the 12th of September, 1911. They made an application for execution by "attachment" of the money in court on the 10th of January, 1912. The court made an order on the 21st of February, 1912, in which it is stated that the property having been attached the money should be paid to the decree-holders upon application. An application for payment was made on the 23rd of February, 1912. On the 26th of February, 1912, Ambika made an objection to the money being paid

(1) (1906) I. L. R., 33 Calc., 639. (2) (1894) I. L. R., 17 All., 82.

(3) (1873) 20 W. R., 73.

to the decree-holders on the ground that he had attached it before judgement. The court on this objection refused to allow the money to be paid out to the decree-holders, who are the plaintiffs in the present case. Ambika got his decree on the 10th of April, 1912. It seems to me that we have to consider what were the rights of the decree-holders on the 23rd of February, 1912, that is to say, were they entitled by law to have their decree satisfied out of the money deposited in court? If they were, they are entitled to a decree in the present suit, provided that their remedy lay by suit. Order XXXVIII, rule 5, provides for attachment before judgement. Property can only be attached before judgement upon the court being satisfied that the defendant, with intent to obstruct or delay the execution of any decree that may be given against him, is about to dispose of the whole or any part of his property, or that he is about to remove the whole or part of his property from the local limits of the jurisdiction of the court. It seems to me absolutely clear that as it is only to prevent one or other or both of these things that attachment before judgement is allowed. Such attachment confers no right in the property on the plaintiff who obtains the order. Everything remains as before the attachment, save that it has been taken out of the power of the defendant to dispose of the property attached or remove it out of the jurisdiction. If there was the least doubt about the matter, it is set at rest by the provisions of order XXXVIII, rule 10, which is as follows:—"Attachment before judgement shall not affect the rights existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree." Supposing, therefore, that the property had not been of a perishable nature, but had been simply attached before judgement, the plaintiffs would have been entitled to have attached the property, have it sold and obtain payment under their decree. Ambika would have had no right of any sort to object to the decree of the plaintiffs being discharged. Some attempt has been made to contend that the fact that the property had been turned into money altered the circumstances. I think that this is a most unreasonable contention. In my opinion the money, which represented the

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property which had been attached before judgement is to be treated in exactly the same way as the property would have been, with this difference only that of course there is no sale. Under these circumstances it seems to me that the plaintiffs were clearly entitled on the 23rd of February, 1912, to have had their decree satisfied out of the money deposited in court.

It is next argued that the dispute between the plaintiffs and Ambika had to be decided by the court in which the money was deposited, and that no suit lay. Order XXI, rule 52, provides that "where property which has been attached is in the custody of the court any question of title or priority arising between the decree-holder and any other person not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such court." Order XXXVIII, rule 8, provides that "where any claim is preferred to property attached before judgement, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money." Order XXI, rule 63, provides that "where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive." It seems to me that the effect of order XXXVIII, rule 8, is to incorporate the provisions of order XXI, and amongst them the provisions of rule 63. The court accordingly having investigated the claim of the decree-holders, the plaintiffs in the present suit, and made an order against them, the effect of which was that they were not allowed to receive payment of their decree, they are entitled to institute a suit. I hold, therefore, that the present suit is maintainable. I would allow the appeal and decree the plaintiffs' claim.

BANERJI, J.—I have arrived at the same conclusion. The first question to be determined is whether the court below was justified in ordering a rateable distribution. It is clear from the provisions of the Code of Civil Procedure that priority of attachment gives no priority of title. Order XXXVIII, rule 10,

clearly provides that where property has been attached before judgement that circumstance does not preclude any other judgement-creditor of the judgement-debtor from attaching the same property and proceeding to the sale of it. It is obvious from the provisions of that rule that, notwithstanding an attachment before judgement, any other creditor who has obtained a decree may proceed to execution and cause the property attached to be sold. The effect of the attachment before judgement is only to prevent the debtor from dealing with the property, but the property still continues to be his. Therefore, the plaintiffs in the present case were entitled to attach the money which was in court, being the proceeds of the sale of the property attached before judgement. As the court made an order on the 23rd of February, 1912, directing the money attached to be paid over to the plaintiffs, the plaintiffs were entitled to receive that money, and the court or the defendant Ambika Prasad could not deprive them of their right to get the money. Had Ambika Prasad already obtained a decree on the date on which the money was ordered to be paid to the plaintiffs and had he applied for execution, different equities might arise. It may be that when several decree-holders have caused the same property to be attached, but to their case section 73 of the Code of Civil Procedure does not strictly apply, they would be entitled to a rateable distribution on general principles of justice, equity and good conscience. But that is not the case here. It is not necessary, therefore, to express any opinion on the point. In the present case, as I have said above, Ambika Prasad had not obtained his decree when the court ordered the money in deposit, attached by the plaintiffs, to be paid over to them. Had the property not been of a perishable nature, and had it not been already sold, the plaintiffs would have been entitled to get it sold, and after the sale to have their decree satisfied out of the proceeds of the sale, and there is nothing in the Code to prevent their doing so merely because Ambika Prasad had caused the same property to be attached before judgement. He had not obtained a decree and had not applied for execution. Section 73 of the Code of Civil Procedure would not apply to a case of this kind, because this was not a case in which several

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decree-holders had before the realization of assets applied for execution of their decrees.

There remains the other question as to whether such a suit is maintainable. As has been pointed out by the learned Chief Justice, rule 52 and the subsequent rules in order XXI are by reason of the provisions of order XXXVIII, rule 8, applicable to cases of attachment before judgement. Under rule 25 of order XXI the court which holds the property is the court which must decide all claims made in respect of it, whether arising from assignment or attachment or otherwise. The mode of investigation is provided for by rule 58 and the subsequent rules, but in all cases, when an order is made, the defeated party is entitled to bring a suit to establish his right under rule 63. The language of that rule differs from that of section 283 of the old Code of Civil Procedure. Under that section a party was allowed to bring a suit when an order had been passed against him under sections 280, 281 and 282. There is no such limitation in rule 63, and this alteration appears to have been deliberately made by the Legislature to include all cases of orders of this kind passed under order XXI, including orders under rule 52. I find that under the old Code of Civil Procedure, it was held that where an order was made under section 272, which corresponds to the present rule 52, a suit would lie to set aside the order, *Tikum Singh* v. *Sheo Ram Singh* (1). The present suit was in my opinion clearly maintainable. I also would allow the appeal.

BY THE COURT.—The order of the Court is that the appeal be allowed, the decree of the court below set aside and the decree of the court of first-instance restored with costs in all courts.

Appeal decreed.

(1) (1891) I. L. R., 19 Calc., 286.

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June, 2.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

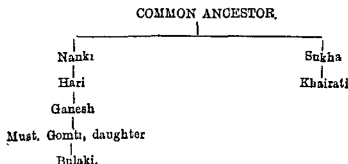
SHIB SAHAI AND OTHERS (PLAINTIFFS) *v.* SARASWATI AND ANOTHER (DEFENDANTS) *

Hindu law—Mitakshara—Bandhu—Grandfather's great-grand-son's daughter's son not a bandhu under the Mitakshara law.

Held that for *bandhu* relationship to exist it is essential that the person claiming to be *bandhu* and the last male owner must have been *sapindas* of each other. The rule of sapinda relationship under the Mitakshara Law extends to seven degrees on the father's side and five degrees on the mother's side including the last owner. Therefore a grandfather's great-grandson's daughter's son is not a *bandhu* under the Mitakshara law.

THE facts of this case are as follows :—

The following pedigree explains the position of the parties :—



The plaintiffs came into court suing for possession as transferees of Bulaki. The last owner of the property was Khairati. He died leaving a widow Chitto Kunwar, who in 1912 made a gift of it to the defendant, who was her relation. After Chitto's death Bulaki, alleging himself to be the next reversioner sold his right to recover possession to the plaintiffs. The defence was that Bulaki was not the next reversioner; that the sale was fictitious, and even if the pedigree was correct, Bulaki was not a *bandhu* and had no right to maintain the suit. The court of first instance decreed the suit, but the lower appellate court reversed the decree. The plaintiffs appealed.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him The Hon'ble Dr. *Sundar Lal*) for the appellants.

* Second Appeal No. 200 of 1914, from a decree of O. E. Guiterman, Additional Judge of Moradabad, dated the 24th of January, 1914, reversing a decree of Kunwar Sen, Additional Subordinate Judge of Moradabad, dated the 28th of July, 1913.

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Bulaki Rai being the son of the last male owner's uncle's grandson's daughter's son was a *bandhu* within the meaning of the Mitakshara. It was true that in the list given in the Mitakshara an uncle's grand-son's daughter's son was not mentioned, but the list was not exhaustive. Sarvadhikari's Tagore Lectures on the Hindu Law of Inheritance, p. 630.

Pandit *Krishna Narain Laghate* (for Dr. *Satish Chandra Banerji*) and Mr. *B. E. O'Conor*), for the respondents, was not called upon.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit for possession of the property of one Khairati Rai. The plaintiff claims as transferee from Bulaki, who is alleged to be the *bandhu* of Khairati Rai, and thus to have inherited his property. According to the pedigree put forward by the plaintiff in the plaint, the relationship between Bulaki and Khairati Rai is this that Bulaki is the son of the daughter of a grandson of the paternal uncle of Khairati's father. The question, therefore, is whether the grandfather's great-grandson's daughter's son is a *bandhu* under the Mitakshara law. The court of first instance was of opinion that the plaintiff's vendor Bulaki was Khairati's *bandhu* "*ex parte maternâ.*" The learned Subordinate Judge clearly misunderstood what was meant by a "*bandhu ex parte maternâ.*" According to the Mitakshara, *bandhus* are of three descriptions, namely, the owner's own *bandhus*, his father's *bandhus*, that is, "*bandhus ex parte paternâ*" and his mother's *bandhus* that is "*bandhus ex parte maternâ.*" There is no question of Bulaki being a "*bandhu ex parte maternâ*" in this case. The question what constitutes a *bandhu* was fully considered by their Lordships of the Privy Council in the recent case of *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (1) and the present case is practically concluded by the ruling of their Lordships. The world "*bandhu*" under the Hindu Law (as has been held in that case also) means a "*sapinda*" who belongs to a different *gotra*, that is to say, a "*bhinna gotra sapinda.*" Therefore, for the *bandhu* relationship to exist it is essential that the person claiming to be the *bandhu* and the last owner must have been *sapindas* of each other. The rule of *sapinda* relationship

(1) (1914) 12 A. L. J., 1281: L. R., 41 I. A., 230.

has been laid down in the Mitakshara and it extends to seven degrees on the father's side and five degrees on the mother's side, including the last owner. Taking the pedigree put forward by the plaintiff, which will be found at page 9 of the paper book, it is clear that Bulaki was one degree beyond the seventh degree counting from the last owner Khairati Rai. We are asked to count the seven degrees from the great grandfather of Khairati who was the common ancestor, and it is said that computing from the common ancestor Khairati is within the seventh degree, but this computation would leave out of consideration altogether Khairati himself and his father. The mode in which relationship should be computed is stated in Sarvadhikari's Tagore Law Lectures (1880) page 707, and that is a mode which the lower appellate court has adopted. We think that the decision of that court is right. We dismiss the appeal with costs.

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Appeal dismissed.

FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Tudball and Mr. Justice Rafiq.

1915 June, 4

ASHRAF ALI (DEFENDANT) v. KALYAN DAS AND OTHERS (PLAINTIFFS).*

Act (Local) No III of 1899 (Court of Wards Act), sections 16 and 20—Claim not notified—Maintainability of suit—Admissibility of documents.

Section 20 of the Court of Wards Act, 1909, applies only to cases, where persons who have notified their claims under section 16 of the said Act have failed to produce their documents. Where the property of the debtor was taken over by the Court of Wards at a time when the Court of Wards Act of 1899 was in force and the creditor did not notify his claim under section 16, but brought a suit upon his bonds after the property was released by the Court of Wards, *held* that the bonds were admissible in evidence and the suit was maintainable. *Collector of Ghazipur* v. *Balbhaddar Singh* (1) overruled.

THE facts of the case were as follows:—

Two mortgages were executed by the defendant, on the 7th of August, 1907, and the 11th of February, 1909, respectively. The estate of the mortgagors was taken over by the Court of Wards and a notification was duly issued, with effect from the

* First Appeal No. 251 of 1913, from a decree of Banke Behari Lal, Additional Subordinate Judge of Aligarh, dated the 1st of May, 1913.

(1) (1912) 10 A. L. J., 234.

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27th of July, 1911, under section 16 of the Court of Wards Act, III of 1899. The mortgagees did not, in compliance with the provisions of section 16, notify their claim under the two mortgages against the estate. The plaintiffs brought this suit after the release of the property from the management of the Court of Wards. The defendant alleged that the mortgage deeds could not now be produced in evidence, and the suit was consequently not maintainable. The court below, holding that section 20 of the Act of 1899 did not apply in the case of a suit brought after the release of the property from the superintendence of the Court of Wards, decreed the suit. The defendant appealed.

Mr. *B. E. O'Conor* (with him The Hon'ble Dr. *Tej Bahadur Sapru*), for the appellant.

Section 20 of Act III of 1899 barred the suit. The Act required every claimant to present full particulars to the Collector when notification under section 16 was issued. The words used were "shall present" and the real question was what was meant by those words. Section 20 laid down that documents not produced under section 16 would not be admissible to prove the claim. It nowhere laid down that the documents would not be admitted so long as the property was under the management of the Court of Wards. The object of taking over the management of the property by the Court of Wards was to preserve the estate and the Act should be strictly interpreted. *Collector of Ghazipur* v. *Balbhaddar Singh* (1). The plaintiffs were not entitled to interest during the period between the notification and the suit.

The Hon'ble Dr. *Sundar Lal* (with him Pandit *Shiam Krishna Dar*), was heard only on the question of interest.

RICHARDS, C.J., and TUDBALL and RAFIQ, JJ.:—This appeal arises out of a suit on foot of two mortgages, the first, dated the 7th of August, 1907, for Rs. 6,500, and the second, dated the 11th of February, 1909, for Rs. 1,000. The plaintiff claims Rs. 10,794, on foot of the two mortgages.

The estate of the mortgagors was taken over by the Court of Wards and a notification was duly issued, with effect from the 29th of July, 1911, under section 16 of the Court of Wards Act, III of 1899. The mortgagees did not, in compliance

(1) (1912) 10 A. L. J., 234.

with the provisions of section 16, notify their claim under the two mortgages against the estate.

It appears that there was some notification of one of the mortgages in October, 1912. This, however, may, for the purposes of our judgement, be disregarded. The estate is not now and was not at the time of the institution of this suit under the management of the Court of Wards. The management was given up in November, 1912. The court below has given the plaintiffs a decree for the full amount of the claim.

In appeal it is contended that the plaintiffs having failed to produce their documents before the Collector, the same are inadmissible in evidence, having regard to the provisions of section 20. Of course if the plaintiffs are unable to adduce their mortgage-deeds in evidence they cannot sustain their suit. On the other hand it is contended that section 20 only applies to the case of persons who have notified their claims under the provisions of section 16 but have failed to produce their documents. It seems to us that the latter contention is clearly correct. Section 17 of the Act provides that, notwithstanding the provisions of the section, any person who has a claim, whether it be allowed or disallowed by the Court of Wards, is entitled to institute a suit, and that notwithstanding that the claim has not been notified. It may possibly be said that this provision only applies to the matters mentioned in the earlier part of the same section. But section 18 makes the matter abundantly clear. In section 18 the penalties for not notifying a claim are set forth. Interest is to cease to run from the date upon which the claim should be notified. Clause (2) provides that all claims not notified are postponed to all claims that have been notified. If section 20 applied to cases where there had been no notification, it would, practically speaking, amount to an enactment that no suit could be brought where a claim had not been notified. If no claim had been notified no documents would be produced. But the words of section 20 themselves show that it only deals with cases where there has been a notification under section 16. The new Act, which was not in force at the time the estate was taken over by the Court of Wards, has laid down entirely new penalties for the

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failure to notify. Section 18 provides as follows: —"Subject to the provisions of section 20, every claim of the nature specified in section 17, against the ward or his property, other than debts due to or liabilities incurred in favour of the Government, which is not notified under section 17, shall be deemed, for all purposes and on all occasions, whether during the continuance of the superintendence of the Court of Wards or afterwards, to have been duly discharged." On behalf of the appellant the case of *Collector of Ghazipur* v. *Balbhaddar Singh* (1) is relied upon. At page 242 of the judgement there is the following passage:—"It was suggested that the obligation to produce documents is laid upon creditors who notify their claims. The argument is that a creditor who does not notify his claim at all may make himself liable to the provisions of section 18 already quoted, but cannot be held liable to the further disability laid down by section 20. There is nothing in the wording of the Act to support this contention, indeed it appears contrary to the clear intention of the provisions under consideration." We cannot agree with these remarks. It seems to us that the wording of the Act shows that the contention is correct.

The only question which remains is the question of the amount of interest allowed. This is a point which is not taken in the memorandum of appeal. We think, however, that we ought to give effect to the clear provisions of section 18. This provides that every claim, save as in the section mentioned, shall cease to bear interest from the date of the expiry of the period prescribed by this section. It is true that one of these mortgages was not payable for a period of five years. It was, however, nevertheless a "claim" against the estate, and we think that under the provisions of the section it ceased to bear interest from the 29th of January, 1912, that is to say six months after the notification. At the same time we think that the plaintiffs ought to have their costs proportionate to their success in both courts, the point not having been taken in the memorandum of appeal to this Court.

We accordingly vary the decree of the court below by directing that interest shall be disallowed on both mortgages from the 29th

(1) (1912) 10 A. L. J., 234.

of January, 1912, up to the date of the institution of the present suit. From that date the plaintiffs will have simple interest at the rate of 6 per cent per annum up to the date of payment. We extend the time for redemption for a period of six months from this date.

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Decree varied.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Rafiq.

1915 June, 19.

KALYAN SINGH AND OTHERS (DECREE-HOLDERS) v. JAGAN PRASAD, (JUDGEMENT-DEBTOR)*

Res judicata *Execution of decree—Failure of judgement-debtor to raise objection to an amount erroneously set forth in an application for the execution of a decree—Civil Procedure Code* (1908), *section* 11, *explanation IV*

Held, that if a judgement-debtor does not take exception to the amount erroneously set forth in an application for the execution of a decree as being the sum due, he is not prevented by the principle of *res judicata* from doing so on a subsequent application for the execution of the same decree.

THE facts of this case were as follows :—

A decree was passed for Rs. 20,200 ; it awarded future interest at the rate of 6 per cent. per annum, but did not specify whether the interest was awarded on the principal sum alone or also on the amount of the costs. The decree was put into execution, the decree-holder including in the decretal amount interest on the amount of costs. The judgement-debtor did not then raise any objection. After some time the decree-holders put in another application for execution seeking to recover a certain sum as balance of the decretal amount still remaining due. The judgement-debtor replied that according to correct accounts nothing remained due, and pointed out for the first time that all along interest had been calculated on the sum awarded as costs as well as on the principal sum, although the decree, truly construed, had not awarded interest on costs. The court allowed the judgement-debtor's objection and dismissed the application for execution. The decree-holders appealed to the High Court and their appeal, coming before a single Judge, was dismissed. They then preferred the present appeal under section 10 of the letters Patent.

Babu *Durga Charan Banerji*, for the appellants.

*Appeal No. 15 of 1915, under section 10 of the Letters Patent.

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Pandit *Kailas Nath Katju*, for the respondent.

RICHARDS, C. J., and RAFIQ, J.—This appeal arises out of an application for execution. The original decree was for Rs. 20,200, with proportionate costs and future interest at 6 per cent. per annum. It is now admitted that under the terms of the decree the decree-holder was only entitled to interest on the principal sum and not upon the costs. From time to time the decree-holder applied for execution. In the account of what he alleged to be due to him he included interest not only on the decretal amount, but also on the costs. At last the situation was as follows:—If the decree-holder was not to get interest on his costs the decree was more than satisfied. If on the other hand he was to get interest upon his costs there would still remain something due to him. The sole question which has to be decided in the appeal is whether or not the judgement-debtor having neglected to take exception to the inclusion in the account of interest on costs, he is now prevented from saying that the decree is satisfied The principle which the decree-holder seeks to set up is that of *res judicata*. The law of *res judicata* appears in section 11 of the Code of Civil Procedure. It provides that "no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court." Explanation IV provides that "any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." It seems quite clear that the provisions of the Code as to *res judicata* are not expressly made applicable to execution proceedings. It is said, however, that there are numerous authorities in which the principle of *res judicata* has been applied to execution proceedings. No authority has been shown to us where it has been decided that if a judgement-debtor does not take exception to the amount set forth as being due in an application for execution, he is prevented by the rule of *res judicata* from ever-

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afterwards raising the question. To hold that he was would not only be applying the rule of *res judicata* in a way not provided for by the Code, but would be also seriously extending the authorities cited. In the present case the question as to how far the decree remained unsatisfied was never raised or decided. It is only by calling to his aid explanation IV that the decree-holder can contend that the question has already been decided. The judgement debtor had very little reason for taking exception to the earlier applications for execution. A large sum was then due on the decree, and he knew that his property must be attached and sold in order to realize what was beyond question due. The judgement-debtor could not well take exception to the application for execution without employing a pleader and incurring expense. When the decree was practically satisfied the question as to how much (if any) remained due for the first time became really important. If it is considered expedient (we do not say it is) to make all the provisions of section 11 of the Code applicable to execution proceedings it should be done by Legislature and not by the judges. We think that the view taken by the learned Judge of this Court was correct and ought to be affirmed. We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Chamier and Mr. Justice Piggott.

1915 *June, 21.*

MUNNA LAL (JUDGEMENT-DEBTOR) v. RADHA KISHAN (DECREE-HOLDER) AND PARBHU DAYAL (OPPOSITE PARTY) *

Civil Procedure Code (1908), order XXI, rule 89—Execution of decree—Application to set aside the sale within limitation—Money tendered but not received through Treasury officer's action.

The judgement-debtor made an application under order XXI, rule 89, of the Code of Civil Procedure to set aside a sale held in execution of a decree on the last day of limitation. The money required to be paid was tendered to the Treasury Officer shortly before 3 p.m., but he refused to take it because there was not sufficient time to count it and also because he thought that it could be paid at any time within three days of the tender. The judgement-debtor paid it the next day which was beyond thirty days after the sale. *Held* that the judgement-debtor having done all that lay in his power to deposit the money in time and having been prevented by the action of the Treasury Officer, should be taken to have made the payment within the time allowed by law. *Mahomed Akbar Zaman Khan* v. *Sukhdeo Pande* (1) referred to.

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* First Appeal No. 13 of 1915, from an order of B. O Forbes, Subordinate Judge of Muttra, dated the 3rd of November, 1914.

(1) (1911) 13 O. L. J., 467.

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KALYAN SINGH v. JAGAN PRASAD.

Pandit *Kailas Nath Katju*, for the respondent.

RICHARDS, C. J., and RAFIQ, J.—This appeal arises out of an application for execution. The original decree was for Rs. 20,200, with proportionate costs and future interest at 6 per cent. per annum. It is now admitted that under the terms of the decree the decree-holder was only entitled to interest on the principal sum and not upon the costs. From time to time the decree-holder applied for execution. In the account of what he alleged to be due to him he included interest not only on the decretal amount, but also on the costs. At last the situation was as follows:—If the decree-holder was not to get interest on his costs the decree was more than satisfied. If on the other hand he was to get interest upon his costs there would still remain something due to him. The sole question which has to be decided in the appeal is whether or not the judgement-debtor having neglected to take exception to the inclusion in the account of interest on costs, he is now prevented from saying that the decree is satisfied The principle which the decree-holder seeks to set up is that of *res judicata.* The law of *res judicata* appears in section 11 of the Code of Civil Procedure. It provides that "no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court." Explanation IV provides that "any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." It seems quite clear that the provisions of the Code as to *res judicata* are not expressly made applicable to execution proceedings. It is said, however, that there are numerous authorities in which the principle of *res judicata* has been applied to execution proceedings. No authority has been shown to us where it has been decided that if a judgement-debtor does not take exception to the amount set forth as being due in an application for execution, he is prevented by the rule of *res judicata* from ever-

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afterwards raising the question. To hold that he was would not only be applying the rule of *res judicata* in a way not provided for by the Code, but would be also seriously extending the authorities cited. In the present case the question as to how far the decree remained unsatisfied was never raised or decided. It is only by calling to his aid explanation IV that the decree-holder can contend that the question has already been decided. The judgement debtor had very little reason for taking exception to the earlier applications for execution. A large sum was then due on the decree, and he knew that his property must be attached and sold in order to realize what was beyond question due. The judgement-debtor could not well take exception to the application for execution without employing a pleader and incurring expense. When the decree was practically satisfied the question as to how much (if any) remained due for the first time became really important. If it is considered expedient (we do not say it is) to make all the provisions of section 11 of the Code applicable to execution proceedings it should be done by Legislature and not by the judges. We think that the view taken by the learned Judge of this Court was correct and ought to be affirmed. We dismiss the appeal with costs.

Appeal dismisesd.

Before Mr. Justice Chamier and Mr. Justice Piggott.

1915 *June*, 21.

MUNNA LAL (JUDGEMENT-DEBTOR) v. RADHA KISHAN (DECREE-HOLDER) AND PARBHU DAYAL (OPPOSITE PARTY)*

Civil Procedure Code (1908), order XXI, rule 89—Execution of decree—Application to set aside the sale within limitation—Money tendered but not received through Treasury officer's action.

The judgement-debtor made an application under order XXI, rule 89, of the Code of Civil Procedure to set aside a sale held in execution of a decree on the last day of limitation. The money required to be paid was tendered to the Treasury Officer shortly before 3 p. m., but he refused to take it because there was not sufficient time to count it and also because he thought that it could be paid at any time within three days of the tender. The judgement-debtor paid it the next day which was beyond thirty days after the sale. *Held* that the judgement-debtor having done all that lay in his power to deposit the money in time and having been prevented by the action of the Treasury Officer, should be taken to have made the payment within the time allowed by law. *Mahomed Akbar Zaman Khan* v. *Sukhdeo Pande* (1) referred to.

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* First Appeal No. 13 of 1915, from an order of B. O Forbes, Subordinate Judge of Muttra, dated the 3rd of November, 1914.

(1) (1911) 13 C. L. J., 467.

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MUNNA LAL v. RADHA KISHAN.

THE facts of the case are as follows :—

The property of one Munna Lal was sold in execution of a decree on the 7th of August, 1914. Application to set aside the said sale was made on the 7th of September, 1914, the 6th of September, 1914, being a Sunday. As required by the rules of the Court the applicant presented the form in triplicate duly filled in before the munsarim of the court, who gave one part of it to the applicant for presentation to the Treasury Officer. The said form contained an order directing the Treasury Officer to receive the money if paid within three days. The applicant presented the said form to the Treasury Officer with a sum of Rs. 12,735-9-0, out of which over Rs. 10,000 were in rupees, a little before 3 p.m. The Treasury Officer finding that it was impossible to count and test the money that day directed the applicant to bring the money the next day. The applicant accordingly deposited the money the next day, *i. e.*, on the 8th of September, 1914. The Subordinate Judge refused to set aside the sale on the ground that the deposit was not made within the time allowed by law. The judgement-debtor appealed to the High Court.

Mr. *Jawahar Lal Nehru*, (for The Hon'ble Pandit *Moti Lal Nehru*) for the appellant.

The appellant did all that he could have done to deposit the money within time. If the Treasury Officer did not receive the money on the 7th it was not the appellant's fault. The Treasury Officer was the officer of the Court, and if he refused to receive the money within time that could not prejudice the appellant. *Mahomed Akbar Zaman Khan* v. *Sukhdeo Pande* (1).

Babu *Lalit Mohan Banerji*, (with him Pandit *Shiam Krishna Dar*) for the respondent.

The appellant waited till the last day and on the 31st day he presented the tender to the Treasury Officer at such a late hour that it was impossible for him to receive the money. The appellant was guilty of gross laches, and so it cannot be said that the money was deposited in time. Under the circumstances the Subordinate Judge was right in refusing the application.

(1) (1911) 13 C. L. J., 467.

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Mr. *Jawahar Lal Nehru*, was heard in reply.

CHAMIER and PIGGOTT, JJ. :—This is an appeal by a judgement-debtor against an order of the Subordinate Judge of Muttra, refusing to set aside a sale held in execution of a decree. The sale took place on the 7th of August, 1914. As September 6th was a Sunday, the judgement-debtor was entitled to make an application under order XXI, rule 89, and pay the sum specified in that rule on September 7th. The evidence shows that the judgement-debtor was not able to raise the money required for the purpose until about 2 o'clock on the afternoon of September 7th. According to the evidence, on September 7th he made an application to the court with a tender in the prescribed form No. 43 duly filled in, and obtained thereon an order of the court that the money should be deposited in the Treasury. He took the money to the treasury shortly before 3 p.m., the hour at which the Treasury is closed so far as the public are concerned. The Treasury Officer looked at his watch and said that it was too late to count the money (Rs. 12,735-9-0) on that date, and he observed that the money could be paid at any time within three days of the tender. He was probably referring to words on the duplicate tender "receive and credit the above sum if tendered to you within three days." But these words cannot be used for the purpose of extending the period of limitation allowed by law. They are intended to facilitate the checking of the accounts kept by the court. The judgement-debtor says that he accepted the statement of the Treasury Officer as correct, and as the Treasury Officer declined to take the money, he took it away and paid it into the Treasury on the following day. The Subordinate Judge has held that it is not proved that the money was tendered before 3 p.m. on September 7th, and has accordingly declined to set aside the sale. The evidence that the money was tendered to the Treasury Officer before 3 p. m. is, however, uncontradicted and should, we think, be accepted. The question, however, is whether under the circumstances, the payment required by order XXI, rule 89, of the Code of Civil Procedure should be taken to have been made within the time allowed by law. The learned counsel for the judgement-debtor relies upon the decision of the Calcutta

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High Court in *Mahomed Akbar Zaman Khan* v. *Sukhdeo Pande* (1), in which it was held, in accordance with the principle *actus curiae neminem gravabit*, that the payment must be taken to have been made in time where the judgement-debtor had applied to the court under rule 89, order XXI, on the 30th day from the sale, and was ready to deposit the required sum in court, and the *challan* to the treasury had been duly filled up and placed in the hands of the proper officer, but the signature of the presiding officer of the court could not be procured on that day as he had left the court. The result was that the *challan* was signed on the following day and on the authority of it the money was received by the Treasury Officer. The Calcutta High Court held that the application of the judgement-debtor to have the sale set aside should under the circumstances have been allowed. The present case is not on all fours with the Calcutta case. In the latter it was quite clear that the court by its own action had prevented the judgement-debtor from paying the money into court within time. In the present case the question is what the Treasury Officer ought to have done when the money was tendered to him shortly before 3 p.m. on September 7th? We are not satisfied that the Treasury Officer could not have arranged for the safe custody of the money until it could be counted in the presence of the judgement-debtor, and we think that it is probable that he would have made some such arrangement if he had not been under the impression that the judgement-debtor was entitled to three days from the date of the tender within which to pay the money into the treasury. Under the circumstances we think that it should be held that the judgement-debtor in this case did all that it was possible for him to do to pay the money into the treasury on September 7th, *i.e.*, within time, and that he was prevented from paying the money by the action of the Treasury Officer, who for this purpose must be regarded as an officer of the court. We, therefore, allow this appeal, set aside the order of the Subordinate Judge, and direct the application be disposed of according to law. We make no order as to the costs of this appeal.

Appeal allowed.

(1) (1911) 13 C. L. J., 467.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Rafiq.

1915 *June, 22.*

SHIVA CHANDAR SINGH AND OTHERS (PLAINTIFFS) *v.* RAM CHANDAR SINGH (DEFENDANT) *

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *section* 164—*Suit by co-sharer against lambardar for share of profits—Burden of proof.*

In a suit by a co-sharer against a lambardar for his share of profits under section 134 of the Tenancy Act, if the co-sharer gives general evidence to show that the rents are greatly in arrear, that the tenants are solvent and that there are no special circumstances why the rents should not have been collected, the *onus* is shifted on to the defendant of showing that for some reason not connected with his own negligence or misconduct he was unable to collect the rents. *Mithan Lal* v. *Misaji Lal* (1) followed.

THE facts of this case were as follows :—

The plaintiffs, co-sharers in a village, sued the lambardar for their share of profits, and they claimed profits on the basis of gross rental alleging that the defendant had been negligent in his collections. They produced evidence to show that the tenants were in a position to pay and also that the defendant had not been keeping any regular accounts. The court of first instance decreed the claim. The appellate court modified the decree holding that no negligence had been proved, and that the plaintiffs had been interfering and realizing rents themselves. The plaintiffs appealed.

The Hon'ble Munshi *Gokul Prasad*, for the appellants.

Mr. *M. L. Agarwala* for the respondent.

RICHARDS, C J., and RAFIQ, J. :—This appeal arises out of a suit brought by co-sharers against the lambardar. The court of first instance held that the defendant had been guilty of negligence and decreed the plaintiffs' claim on the basis of the gross rental. The lower appellate court varied the decree of the court below. In the course of his judgement the learned District Judge says :—" The next point urged is that the profits should be calculated on actual collections and not on the recorded rentals as has been done by the lower court. This plea in my opinion must be allowed, for in a suit under section 164 of the

* Second Appeal No. 571 of 1914, from a decree of Muhammad Ali, District Judge of Moradabad, dated the 3rd of February, 1914, modifying a decree of Muhammad Imdad Ali, Honorary Assistant Collector, First class, of Moradabad, dated the 30th of June, 1913.

(1) (1912) 10 A.L.J., 529.

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Tenancy Act, profits must be allowed on actual collections, unless it is proved that the rents have remained uncollected owing to the negligence or misconduct of the lambardar. In this case as far as I can see there is nothing to show that the rents were not collected through the negligence or misconduct of the defendant." The court of first instance had stated:—"The *patwari* further states that the amount of arrears is recoverable and the tenants are in a position to pay it. Accordingly on the plaintiffs' application the defendant lambardar was examined. When he was asked to state the cause of such heavy arrears, he did not give any satisfactory cause. On the other hand he stated that he knew nothing at all, that he had no account-book of collections and arrears, nor could he state what amount of money was realized from what tenant, and what amount of money was in arrears. The burden of proof that the money which is due by the tenants remained in arrears owing to unavoidable circumstances lay on the defendant. But he did not prove it. The statement of the defendant that he did not know anything at all proves that he had not made his statement in good faith." It seems to us that if a co-sharer gives general evidence to show that the rents are greatly in arrear, that the tenants are solvent, and that there are no special circumstances why the rents should not have been collected, the *onus* is shifted on to the defendant of showing that for some reason not connected with his own negligence or misconduct he was unable to collect the rents. It is very difficult to see what other evidence a co-sharer under ordinary circumstances could give. This view was taken by a learned Judge of this Court in the case of *Mithan Lal* v. *Mizaji Lal* (1). In the present case the evidence of the lambardar, as pointed out by the court of first instance, was extremely unsatisfactory. If the defendant knew nothing about the circumstances of the village, he should have produced his *karinda*. There seems to be no dispute about the expenses. We think before finally disposing of the appeal, we shall refer the following issue to the court below:—"What rents for the years in suit were left unrealized and how much of these arrears were unrealized on account of the negligence or

(1) (1912) 10 A. L. J., 529.

"misconduct of the lambardar?" We direct the court below to order the lambardar (within a time to be specified in the order) to file an account showing the names of the tenants, the amounts that have been realized from each of the tenants, and the amounts left unrealized. In the case of rents unrealized the lambardar will give in a column of the account his reasons why these rents were not realized. When this account has been filed the plaintiffs will have a right to see the same, and they will then be entitled to go into evidence to show that in respect of the moneys not realized, the lambardar was guilty of negligence or misconduct. The lambardar will of course have a right to rebut the evidence, if any, produced by the plaintiffs. The usual ten days will be allowed to file objections on return of the finding.

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Issue remitted.

Before Mr. Justice Chamier and Mr. Justice Piggott.

1915 *June, 5.*

JIA BIBI (APPLICANT) v. ILAHI BAKHSH AND OTHERS (OPPOSITE PARTIES) *

Act No. IX of 1908 (Indian Limitation Act) article 164–Application to set aside an ex parte decree passed when Act No. XV of 1877 was in force —Limitation.

The plaintiff obtained an *ex parte* decree on the 29th of November, 1904, which was made absolute on the 24th of August, 1907. The proclamation of sale was brought to the village on the 19th of December, 1912. The defendant on the 9th of January, 1913, applied to have the *ex parte* decree set aside. The plaintiff contended that the defendant had knowledge of the decree prior to 1910, and, therefore, her application was barred by article 164 of the Indian Limitation Act of 1908. The defendant contended that article 164 of the Limitation Act of 1877, applied to her case. *Held* that the defendant's application was barred by article 164 of Act IX of 1908. *Hope Mills Limited* v. *Vithaldas Pranjivandas* (1) referred to.

THE facts of the case were as follows:—

A decree under section 88 of the Transfer of Property Act, was passed *ex parte* as against a certain defendant on the 29th of November, 1904. A decree absolute under section 89 was passed *ex parte* as against the same defendant on the 24th of August, 1907. Proclamation of sale was brought to the village on the 19th of December, 1912. On the 9th of January, 1913, the

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* First Appeal No. 72 of 1915, from an order of Suraj Narain Majju, Subordinate Judge of Azamgarh, dated the 27th of January, 1915.

(1) (1910) 12 Bom. L. R., 730.

He then supported on the evidence the finding of the lower court as to the time when appellant had knowledge.

Babu *Piari Lal Banerji*, in reply.—

The question in issue in the two cases was as to the tribunal, in which a certain appeal would lie and as to the mode in which a debt was to be proved against a firm in liquidation. If the question involved in the present case be deemed one of mere procedure, then the questions involved in those two cases were equally matters of procedure and yet it was held that the new enactment would not have retrospective effect.

CHAMIER and PIGGOTT, JJ. :—This is an appeal against an order of the Subordinate Judge of Azamgarh, rejecting an application for setting aside a decree passed *ex parte* against the appellant in 1904. Her case was and is that she did not come to know of the decree in question until a proclamation of sale was brought to the village in December, 1912, that is, less than thirty days before she presented her application. The evidence shows that the plaintiffs in the suit made repeated efforts to serve her personally with notice of the suit and of subsequent proceedings. Substituted service was effected and declared to be sufficient by the court. She has herself sworn that she did not come to know of the decree against her until a few days before she made her application. Evidence has been produced on behalf of the respondents which has been accepted by the court below, that she was aware of the suit at the time when it was pending and was anxious to enter into a compromise. It is almost inconceivable that she would have remained ignorant of this suit, as she says, for eight or nine years. She says that she has been quarrelling with her son-in-law for the last twenty years. She must have other relatives who must have come to know of the suit, and we think there can be little doubt that she knew of the suit while it was pending. We accept the evidence which has been produced by the respondents to prove that she was aware of the suit. It is contended that the application should be governed in the matter of limitation not by article 164 of the Limitation Act which was in force at the time when the appellant made her application, but by article 164 of the Limitation Act of 1877, which provided that an application to set aside a judgement

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ex parte might be made within thirty days from the date of exe[cut]ing any process for enforcing the judgement. It is conceded that such process was executed before the passing of the new Limi[ta]tion Act. It has been repeatedly held that in a case of this ki[nd] the law of limitation to be applied is the the law existing at t[he] time when the application is made. It is sufficient to refer to th[e] decision of the Bombay High Court in *The Hope Mills Limite[d]* v. *Vithaldas Pranjivandas* (1). There can be no doubt that the application is governed by the present Limitation Act and is barred thereby and was rightly dismissed both on the merits and also on the ground of limitation. This appeal fails and is dismissed with costs.

Appeal dismissed.

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June, 23.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Rafiq.

JAHANGIR AND ANOTHER (DEFENDANTS) v. SHEORAJ SINGH (PLAINTIFF) *

Act No. I of 1872 (*Indian Evidence Act*), *section* 32, *clause* (6)—*Pedigree.*

A document ancient and genuine, purporting to be a family pedigree was produced in evidence in a mutation case by one Jiraj. The record was brought before the civil court in a suit in which the plaintiff's relationship to one Hulas, the last male owner of certain property, was in question. Jiraj stated that he had received the pedigree from his grandfather. It was not proved who had prepared the pedigree. *Held* that it was not necessary to show who had made the statements mentioned in the pedigree and that it was admissible in evidence under section 32, clause (6), of the Evidence Act.

THE facts of this case were as follows :—

One Hulas was the last holder of certain property. His widow made a deed of gift of that property in favour of the defendant. The plaintiff brought this suit for a declaration that the deed should be declared to be inoperative after her death. The defendant pleaded that the plaintiff did not belong to the family. In support of his claim the plaintiff produced a pedigree which had once been produced in the Revenue Court. The pedigree was produced by a witness who alleged that he was a member of the family, and that it had been given to him by his

* Second Appeal No. 670 of 1914, from a decree of C. E. Guiterman, District Judge of Moradabad, dated the 5th of February, 1914, reversing a decree of Kunwar Sen, Additional Subordinate Judge of Moradabad, dated the 28th of August, 1913.

(1) (1910) 12 Bom. L. R., 730.

grandfather. No objection to its admissibility was taken at the time. The court below found the pedigree proved and decreed the suit.

The defendant appealed to the High Court.

Dr. *Surendra Nath Sen*, for the appellants:—

The pedigree was not admissible in evidence. It could be admitted under section 32 of the Evidence Act, and the first thing to prove was that it was a statement made by a deceased person. There was no proof of that in the present case. Further, the question here was whether the plaintiff bore a certain relationship to a certain deceased person and clause (6) would not apply. That clause only applied when the question was as to the relationship of two deceased persons It was not known who made the statement, nor was it known that it was intended to be a statement containing an account of the relationship of persons deceased belonging to Jiraj's family. The paper in question was not a pedigree at all. A pedigree was a record kept in certain families to show the relationship of certain persons. Here clause (6) did not apply as the object of Jiraj by producing the pedigree was to establish a relationship between Hulas the deceased and Shewraj who was alive. There was, moreover, nothing to show that Jiraj's grandfather ever believed this to be the family pedigree. No statement not open to the tests of oath and cross-examination should be received in evidence till the requirements of section 32 were strictly complied with.

Mr. *Nehal Chand* (for Mr. *B. E. O'Conor* with him Mr. *A. H. C. Hamilton*), for the respondent:—

The person who produced the pedigree was a member of the same family as the deceased. He stated that he had got the pedigree from his grandfather. It must, therefore, be presumed that the pedigree was written by a person who was dead. Section 32, therefore, was clearly applicable and clause 6 of that section clearly covered the case. The paper which purported to be a pedigree was produced by a person who belonged to the family and got it from his grandfather. It was, therefore, admissible in evidence. Charts of pedigrees have been held to be admissible.

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Dr. *Surendra Nath Sen*, in reply, contended that all statements in pedigree were not admissible, but only such statements as were usually made in it. In India horoscopes supplied the place of pedigrees and pedigrees such as were to be found in family Bibles were very rare among Hindus. The provision about family pedigrees was introduced into the Indian Evidence Act because the Act applied to Hindus, Muhammadans and Christians alike, the last of whom kept family pedigrees in Bibles, &c. *Jagatpal Singh*, v. *Jageshar Bakhsh Singh* (1). It had been held that a horoscope was admissible in evidence under section 32, clause (6), if it was proved that the man writing it had special means of knowledge; *Satis Chunder Mukhopadhya* v. *Mohendro Lal Pathuk* (2).

RICHARDS, C.J., and RAFIQ, J. :—This appeal arises out of a suit brought by the plaintiff for a declaration that a certain deed of gift made by one Musammat Sanjia in favour of the defendant should be held to be null and void after her death. The court of first instance dismissed the plaintiff's suit. The lower appellate court gave him a decree.

Having regard to the fact that this is a second appeal, the learned vakil on behalf of the defendant appellant was bound to admit that the only question that could be argued was the admissibility in evidence of a pedigree relied upon by the plaintiff, on the strength of which the lower appellate court decreed the plaintiff's claim. Objection to the admissibility of evidence taken at a late stage in litigation is not to be encouraged. The proper time to object to the admissibility of evidence is at the trial when the evidence is tendered, and it is then that the court should rule as to the admissibility or inadmissibility of the evidence. When the objection is taken at the proper time the party wishing to produce the evidence may be able to take steps to make the evidence admissible. If the objection is not taken until a late stage in the litigation it may mean that an appellate court is obliged to decide against the party on a technical ground or the time of the court is taken up in re-trying matters which ought to have been disposed of at the original hearing, the result being loss of public time and additional and unnecessary expense to the litigants.

(1) (1902) I. L. R., 25 All., 143. (2) (1890) I. L. R., 17 Calc., 849, (851).

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The document in question is an alleged pedigree showing the relationship of a number of persons, and amongst others of Hulas (the husband of Musammat Sanjia) with one Bhusa. The document according to the finding of the court below was an ancient document and genuine. A witness of the name of Jiraj produced the document It had been filed in mutation proceedings, the record of which case was sent for. Jiraj identified the document and stated that he had received it as a family pedigree from his grandfather. No objection appears to have been taken to the admissibility of this document in evidence in the court of first instance, although its genuineness was not admitted. In the lower appellate court it was objected to on the ground that it was inadmissible because no evidence was adduced to show who had made it. We think that having regard to the stage at which objection as to the admissibility of the document is made, we should treat it as a document produced by Jiraj, who proved that he received it from his grandfather, as being a document which contained the particulars of the family relationship. We must also assume that the statements made by the witness Jiraj are true, they having been believed by the lower appellate court. The question is whether under these circumstances the document is or is not admissible in evidence. Section 32 of the Evidence Act provides that "statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under *the circumstances of the case*, appears to the court unreasonable, are themselves relevant facts in certain cases. Clause (6) is as follows:—" When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any *family pedigree*, or upon any tomb-stone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised." We assume for the purposes of our decision that it was impossible to show who in fact had made the statements contained in the pedigree, that the pedigree was made before the question in

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dispute had arisen, and necessarily that it was impossible to call as witness the person who had made the material statements contained in the pedigree. The question is whether on these assumptions the document was admissible. We think that it was. Neither the section nor the clause provides that it is necessary to show who it was that made the statements. In the case of an old pedigree it would be generally quite impossible to give evidence as to who was the author of the statements. We may point out that in the present case we are not called upon to express any opinion as to the genuineness of the document, or the weight to be attached to the evidence. In our opinion the decision of the court below was correct and ought to be affirmed. We accordingly dismiss the appeal with costs.

Appeal dismissed.

PRIVY COUNCIL.

*P. C. 1915. June, 3, 4. July, 29.

BUDDHA SINGH AND OTHERS (PLAINTIFFS) *v.* LALTU SINGH AND OTHERS (DEFENDANTS.)

[On appeal from the High Court of Judicature at Allahabad.]

Hindu Law—Inheritance—Mitakshara—Benares school of Law—Great grandson of grandfather of deceased male owner—Grandson of great-grandfather of deceased—"Putra", Interpretation of—Lineal and collateral descendants—Blood relationship or propinquity among gotrajas—Test is capacity to offer oblations—Introducing into the decision the opinion of another Judge not a party to the judgement—Practice not approved.

On this appeal, in which the question for decision related to the order of succession under the Mitakshara, as expounded in the Benares school of Hindu Law, among the collateral kindred belonging to the same paternal stock as the last male owner, who died leaving no male issue.

Held (affirming the decisions of the courts in India) that the respondent (defendant) as the great grandson of the grandfather of the deceased, and the grandson of his paternal uncle, was the preferential heir as against the appellant (plaintiff) who was the grandson of the deceased's great grandfather.

The word "putra," which when used in relation to the last owner signifies and includes, "son, grandson and great grandson", thus including three degrees in the direct line of descent, is not to be construed in a literal and restricted sense when used in connexion with collateral relatives such as brother, uncle or grand-uncle.

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*Present:—Lord SHAW, Sir GEORGE FARWELL, Sir JOHN EDGE and Mr. AMEER ALI.

The following cases were referred to and discussed:—*Rutcheputty Dutt Jha* v. *Rajunder Narain Rae* (1); *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (2); *Kureem Chand Gurain* v. *Oodung Gurain* (3); *Kalian Rai* v. *Ram Chandar* (4); *Rachava* v. *Kalingapa* (5); *Parasara Bhattar* v. *Rangaraja Bhattar* (6); *Suraya Bhukta* v. *Lakshminarasamma* (7), and *Chinnasami Pillai* v. *Kunju Pillai* (8), and the last two cases were dissented from.

The respondent was also entitled to succeed on the ground that he admittedly conferred greater benefit on the deceased by the offerings he was capable of making to the manes of the common ancestor. In judging of the nearness of blood relationship or propinquity among the gotrajas, the test to discover the preferential heir is the capacity to offer oblations.

Bhyah Ram Singh v. *Bhyah Ugur Singh* (2), and the principle laid down in the Viramitrodaya, G. C. Shastri's translation, page 91, chapter II, part I, section 23a., and by Dr. Sarvadhikari, Tagore Law Lectures (1880) page 629, followed.

It is an undesirable course and one not approved by their Lordships of the Judicial Committee, to introduce the opinion of another Judge not a party to the judgement, for the purpose of enforcing the conclusion arrived at

APPEAL 110 of 1914 from a judgement and decree (6th July, 1912) of the High Court at Allahabad, which affirmed a judgement and decree (23rd June, 1910) of the Subordinate Judge of Moradabad.

The only question for determination in this appeal was whether, according to the Benares school of the Mitakshara Law, by which the parties were governed, the first plaintiff (the appellant Buddha Singh) as the grandson of the great grandfather, or the first defendant (the respondent Laltu Singh) as the great grandson of the grandfather, of the last male owner, was the preferential heir.

The pedigree of the family is set out in the judgement of their Lordships of the Judicial Committe. The last male owner of the property in suit was one Saheb Sahai, and on his death in 1873, a minor and unmarried, his mother Rani Kishori Kunwar succeeded him as his heiress, and held the property until her death on the 15th of August, 1907. The plaintiffs (and appellants) 2 and 3 were transferees of a part of the interest of Buddha Singh in the properties in suit, and they sued the defendants, who were in possession of the properties in dispute, for recovery thereof.

(1) (1836) 2 Moo I. A., 133 (153).
(2) (1870) 13 Moo. I. A., 373.
(3) (1866) 6 W. R., 158.
(4) (1901 L. R., 24 All., 128.
(5) (1892) I. L. R., 16 Bom., 716.
(6) (1880) I. L. R., 2 Mad., 202.
(7) (1881) I. L. R., 5 Mad., 291.
(8) (1912) I. L. R., 35 Mad., 152.

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Both the courts below decided the above question in favour of the defendant. The report of the case in the High Court (BANERJI and PIGGOTT, JJ.) will be found in I. L. R., 34 All., 663.

On this appeal—

De Gruyther, K.C., and *A. M. Dunne*, for the appellants, contended that the first appellant Buddha Singh, as being the grandson of the great grandfather of the last male owner, was entitled to succeed in preference to the respondent, who was the great grandson of the deceased owner's grandfather, and the grandson of his paternal uncle. No doubt, in lineal male descent the word "son" is rightly construed as extending at least to the great grandson; but in the case of collaterals, and therefore in the text of the Mitakshara (Chapter II, section 5, verse 4), on the right construction of which the question of succession in dispute depends, the word "sons", it was submitted, must be construed literally and so be restricted to the "son" and the "grandson". Then on the construction of verse 5 of section 5, Chap. II, "on failure of the paternal grandfather's line, the paternal great grandmother, the great grandfather, his sons, and their issue" the first appellant, as grandson of the great grandfather, would be the next heir. The proper translation of the text, Colebrooke's translation being incorrect, was that adopted by the Board in *Lullabhai Bapabhai* v. *Cassibai* (1). The word "putra" in the Mitakshara, Chap. I, which deals with the succession where the owner dies "aputra" or "sonless" has a technical meaning, namely "son, grandson, and great grandson," see Golapchandra Sarkar's translation of the Viramitrodaya, (Ed. 1879), pages 154, 158, Chap. III, part I, section 11; Mandlik's Hindu Law (Ed. 1880), page 380; and Mayne's Hindu Law, page 754, paragraph 540. In the passages of the Mitakshara now under consideration (Chap. II, section 4, verse 7, and section 5, verses 1, 4, and 5) the words used are "suta," "putra", "sunava", each meaning simply "son", and "santana", meaning only such of the descendants as are previously mentioned and are entitled to inherit. The word "son" used in conjunction with "brother," does not include a grandson. There are three separate words in Sanskrit used

(1) (1880) I. L. R., 5 Bom., 110 (122, 128); L. R., 7 I. A., 212 (234, 235).

respectively for "son", "grandson", and "great grandson", namely "putra", "pautra", and "prapautra"; but the author of the Mitakshara has not made use of these separate words, and the inference therefore is that he did not intend to give the word "putra", the extended meaning given to it in Chap. I. The general opinion of the commentators, therefore, is that the word does not include "grandson". Reference was made to the Subodhini, a translation of which is given in *Suraya Bhukta* v. *Lakshminarasamma* (1), and which is a work of authority in the Benares school, see the Vyavastha Chandrika, Vol. I, preface, page 17; 1, Morley's Digest, Introduction, page 205, where the names of the commentaries on the Mitakshara and their values as authorities are given; Mandlik's Hindu Law, pages 361 and 363, West and Bühler's Hindu Law (3rd Ed.), page 124; Jolly's Hindu Law, (Ed. 1885), page 14; and Sarvadhikari's Hindu Law of Inheritance (Ed. 1882), page 647. The Viramitrodaya Chap. III, verses 6 and 7; and the Kamalakara (see Mandlik's Hindu Law, page 385) take the same view. The Viramitrodaya is of high authority in Benares; see *Gridhari Lal Roy* v. *The Bengal Government* (2). All the authorities stop at a brother's son. Aparaka and Nanda Pandit, the author of the Vaijayanti, are of a contrary opinion, but they are not commentators of any authority in the Benares school; see Mayne's Hindu Law, (8th Ed.), pages 27 and 28; Jolly's Hindu Law, page 13; and Sarvadhikari's Hindu Law of Inheritance (Ed. 1882), pages 426 and 428 where passages of Aparaka are translated. [*Sir R. Finlay, K.C.*, referred to Sarvadikari's Hindu Law, page 648]. A passage from the Vaijayanti, a commentary on Vishnu, will be found in the Sacred Books of the East, Vol. VII, page 68, note 10. The Smriti Chandrika, a high authority in Madras, but not in Benares, expressly limits the descent to two degrees [Mr. AMEER ALI referred to *Parasára Bhattar* v. *Rangaraja Bhattar* (3) where there are comments on the Smriti Chandrika]. It is an authority followed in *Suraya Bhukta* v. *Lakshminarasamma* (1), where "son" in the passages of the Mitakshara, Chap. II, now under consideration did not include "grandson". The

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(1) (1881) I. L. R., 5 Mad., 291 (295). (2) (1868) 12 Moo. I. A., 448 (450)

(3) (1880) I. L. R., 2 Mad., 202 (205).

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High Court at Allahabad dissented from the decision in that case in *Kalian Rai* v. *Ram Chandar* (1), and held that a brother's grandson could succeed, and was a preferential heir to the son of paternal uncle. In a later decision however the Madras High Court followed their former decision in *Suraya Bhukta* v. *Lakshminarasamma* (2); see *Chinnasami Pillai* v. *Kunju Pillai* (3). In *Kureem Chand Gurain* v. *Oodung Gurain* (4) the right of a brother's grandson was recognized by the Calcutta High Court. [*Sir R. Finlay, K.C.*, referred to the judgement of E. JACKSON, J., in the last cited case at page 160 of the report to the effect that the word "putra" included grandsons and all others who could offer funeral oblations.] That case was followed by the same court in *Mussamut Oorhya Kooer* v. *Rajoo Nye Sookool* (5), but in both the last named cases there was no other claimant and the issue was therefore not the same as in the present case. [Lord SHAW referred to the case of *Thakoor Jeebnath Singh* v. *The Court of Wards* (6).] That was a contest between gotraja sapindas and bandhus. The case of *Rutcheputty Dutt Iha* v. *Rajunder Narain Rae* (7) gives the opinion of Mr. Harington that among gotraja sapindas seven degrees were permissible in each line of heirs, which, it was submitted, was clearly wrong: see West and Bühler's Hindu Law, page 124: it was also merely an *obiter dictum*. It seems, however, to have been approved by this Board in *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (8). The cases decided in Bombay, *Rachava* v. *Kalingapa* (9) and *Kashibai* v. *Moreshvar Raghunath* (10) are not applicable as the only issue in them concerned the succession of female gotrajas. Mayne's Hindu Law (8th Ed.), paragraph 571; and Sarvadhikari's Hindu Law, page 178, were also referred to.

Sir R. Finlay, K.C., and *B. Dube*, for the respondents, contended that on a proper construction of the Mitakshara according to the Benares school the respondent Laltu Singh had a preferential right to succeed as against the appellant. The contention

(1) (1901) I. L. R., 24 All., 128.
(2) (1882) I. L. R., 5 Mad., 291 (295).
(3) (1911) I. L. R., 35 Mad., 152.
(4) (1866) 6 W. R., 158.
(5) (1870) 14 W. R., 208.
(6) (1870) 5 B. L. R., 442: 14 W. R., 117: Affirmed by P. C., (1874) L. R., 2 I. A., 163.
(7) (1839) 2 Moo. I. A., 132 (153).
(8) (1870) 13 Moo. I. A., 373.
(9) (1892) I. L. R., 16 Bom., 716.
(10) (1911) I. L. R., 35 Bom., 389.

that the succession in the grandfather's line was limited to two degrees was not, it was submitted, a proper construction. The Mitakshara, Chap. II, section 5, verse 4, allowed at least three degrees before the grandfather's line was exhausted, the inheritance admittedly went to the great-grandson. And from the fact that in Chap. I, section 3, only the son and grandson were mentioned it did not follow that the great grandson was excluded; that could not be contended. It was submitted that the word "putra" or "son" had the same extended meaning in Chap. II, section 5, verse 4, as it admittedly had in Chap. I. It was an arbitrary and not a reasonable construction that the succession in the line of the paternal grandfather should not go to his great grandson, but be confined to the grandson. If the issue of the sons of the great-grandfather were to be allowed to succeed, why were the issue of the sons of the grandfather to be excluded? The true construction of the texts of the Mitakshara in question was that three immediate descendants of the grandfather succeed in preference to the great grandfather and his descendants.

Counsel was stopped, and their Lordships called on *De-Gruyther, K.C.*, who said he had nothing further to add.

1915, July 29th. The judgement of their Lordships was delivered by Mr. AMEER ALI:—

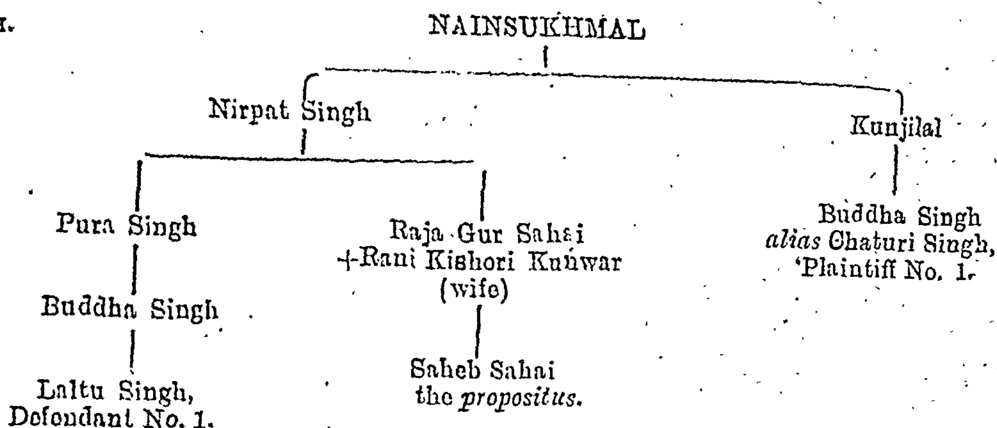
The question for determination involved in this appeal is one of considerable importance under the Hindu Law, and relates to the order of succession under the *Mitakshara* as expounded in the Benares school, among the collateral kindred belonging to the same paternal stock as the deceased.

The suit out of which the appeal arises was brought by the appellant Buddha Singh *alias* Chaturi Singh to establish his right as the nearest reversioner to the estate of one Saheb Sahai, who died in 1873, without leaving any male issue. Saheb Sahai was a minor and unmarried at the time of his death; his mother, Rani Kishori Kunwar, who survived him, accordingly came into the possession of his estate, which she held for nearly 34 years. She died in 1907, when the succession opened to the male collaterals of Saheb Sahai.

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The following genealogical table, on which both the courts in India have based their judgements, will explain the relative position of the parties to this action :—



The plaintiff, Buddha Singh, is thus the grandson of Nainsukhmal, the greatgrandfather of Saheb Sahai, whilst the defendant Laltu is the great grandson of Saheb Sahai's grandfather, Nirpat, and the grandson of his paternal uncle, Pura. The plaintiff's contention is that under the law of the *Mitakshara* he has a preferential title to the inheritance of Saheb Sahai as against the defendant, who is admittedly in possession of the deceased's estate since Rani Kishori's death. He bases his right on the following text of the *Mitakshara* :—" On failure of the father's descendants the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons" (1). And he contends that the expression " sons " occurring in this verse must be strictly construed, and so construed, the devolution of the inheritance in Nirpat's line ceased with his grandson, Buddha, and did not come down to his great grandson, the defendant Laltu, and that after Buddha, by virtue of the immediately following verse he, as the grandson of the great grandfather of the deceased, has become entitled to the estate. Their Lordships will refer presently a little more fully to this text and examine its meaning by the light of other texts.

Both the courts in India have held against the plaintiff's claim; hence this appeal to His Majesty in Council.

The learned Judges of the Allahabad High Court in two separate and able judgements have exhaustively reviewed the

(1) Colebrooke's translation, Chap. II, section 5, v. 4.

authorities bearing on the subject, and as their Lordships agree in the main with their deductions and the conclusion at which they have arrived on these deductions, they find themselves relieved of the necessity of discussing the law in any detail.

The *Mitakshara* of Vijnaneswara, who flourished about the end of the eleventh and the beginning of the twelfth century of the Christian era, purports to be a commentary on the Institutes of Yajnavalkya. Vijnaneswara analyses and discusses the text of his great predecessor, often at considerable length, explains the meaning of recondite passages, supplies omissions and reconciles discrepancies by frequent reference to other old expounders of the law. The best example of his treatment of Yajnavalkya's text is to be found in the commentary on the rule relating to the succession to the estate of a person who dies without leaving any male issue. After stating that the right of "sons, principal and secondary" to "take the heritage" had been already shown, he proceeds to quote the rule of Yajnavalkya declaring the order of succession in their default, which runs thus (2):—"The wife, and the daughters also, both parents, brothers likewise, and their sons, gentiles, a pupil, and a fellow student: on failure of the first among these, the next in order is indeed heir of one who has departed for heaven leaving no male issue. This rule extends to all persons and classes.'

Mr. Mandlik's rendering of these two slokas of Yajnavalkya is more literal and is as follows (3):—

"The wife, daughters, both parents, brothers and likewise their sons, *gotrajas* (gentiles); *bandhus* (cognates); a pupil and a fellow student. Of these, the next following on failure of the preceding in order is heir to the estate of one who has departed for heaven, leaving no *putra*. This rule extends to all (males whether belonging or not to the four) classes."

The compound word *aputra* occurring in Yajnavalkya's text has been rendered by Mr. Colebrooke as "leaving no male issue"; by Mr. Mandlik as "leaving no *putra*." He was evidently anxious to avoid any English synonym, as the word *putra* here, according to all the commentators, conveys a larger meaning than is usually implied by the term "son." The *Viramitrodaya* says clearly that the word "sonless," which is the literal equivalent of

(2) Mr. Colebrooke's translation of the Mitakshara, Chap. II, Sec. 1, para 2.

(3) Mandlik's translation of the Institutes of Yajnavalkya, p. 220, vv. 135, 136.

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aputra, signifies "in default of son, grandson and great grandson," (4) that, in other words, it comprehends three degrees in the direct line of descent. In fact, it is not disputed at their Lordships' Bar that the word *putra* as used in relation to the last owner signifies and includes son, grandson, and great grandson. What is contended for is that the same word in connection with other relatives, such as brother, uncle or grand-uncle, must be construed in a restricted and literal sense.

The commentary of Vijnaneswara on the above quoted slokas of Yajnavalkya, extends over several sections in Mr. Colebrooke's translation, and makes the work more a digest than a mere commentary. In section 1 of Chapt. II, the author deals exhaustively with the right of the widow to inherit the estate of "one who has died *aputra*." Her right of succession is dependent on his leaving no male issue to the third degree. In paragraph 3 the word *putra* is used again in the same generic sense. After treating of the rights of daughters and parents in sections 2 and 3 respectively, he deals in section 4 with the succession of brothers and "their sons." Here, again, the word *putra* is used, whether in the literal or in an extended sense is a matter for consideration.

Section 5 relates to the right of collateral kindred of the same paternal stock or *gotra*, and therefore called the *gotraja*, to take the inheritance of the *aputra* in default of "brother's sons." Admittedly both the plaintiff and the defendant are Saheb Sahai's *gotrajas*. Reference, therefore, is necessary to the rules embodied in section 5.

It is to be noted here that the word *putra* or more correctly *put-tra*, which literally means "one who releases from hell "(*put*)," is used by Vijnaneswara at the very beginning of his Book on Inheritance. In paragraph 3, section 1, Chap. I, describing the two kinds of property (*daya*, wealth) to which rights of inheritance attach, viz., the "unobstructed" and "obstructed," he speaks thus of the latter class :—

"but property devolves on parents (or uncles) and brothers and the rest, upon the demise of the owner if there be no male issue, and thus the actual existence of a son and the survival of the owner are impediments to the

(4) Chap. III, Part I, v. ii., Shastri Golap Chundra Sarkar's translation, p. 154.

succession; and on their ceasing the property devolves [on the successors] in right of his being uncle or brother. This is an inheritance subject to obstruction."

And then comes the significant passage :—

"The same holds good in respect of their sons and other decendants," meaning, clearly, the sons and *descendants* of uncles and brothers And this is the construction which Balambhatta, one of the best known commentators of the *Mitakshara*, appears to have put on these words.

As pointed out in the case of *Ramchandra Martand Waikar* v. *Venayak Venkatesh Kothekar* (5), the right of collaterals to succeed to the inheritance of a deceased person is based on the rule of Manu, which has been translated differently by different writers, but which in substance amounts to this, that the estate of a deceased goes to his nearest *sapinda*. The right of collaterals, therefore, is dependent on the existence of the *sapinda* relationship between the *propositus* and the claimant. It is now well settled by the decisions of this Board that under the *Mitakshara* (6) the *sapinda* relationship arises "between two people through their being connected by particles of one body," viz., that of the common ancestor, in other words, from community of blood in contradistinction to the *Dayabhaga* notion of "community in the offering of religious oblations." But, as will be shown later on, the *Mitakshara*, whilst holding that the right to inherit does not spring from the right to offer oblations, does not exclude it from consideration as a test of propinquity or nearness of blood.

Mr. Colebrooke has, in his translation of section 5, erroneously rendered the word *sapinda* as "relations connected by funeral oblations," and *samanodakas* as those connected by "libations of water," which has led to some confusion of ideas. Their Lordships, therefore, propose to follow the translation which was before this Board in *Lulloobhoy's* case.

The first paragraph stands thus :—"If there be no brother's sons, *gotrajas* share the estate. *Gotrajas* are the paternal grandmother and *sapindas* and *samanodakas*."

(5) (1914) L. R., 41 I. A., 290; I. L. R., 42 Calc., 384.

(6) (1880) *Lulloobhoy Bappoobhoy* v. *Cassibai* L. R., 7 I. A., 212; I. L. R., 5 Bom., 110; (1914) *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* L. R., 41 I. A., 290: I. L. R., 42 Calc., 384.

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Their Lordships understand that the word rendered "sons" in this paragraph is *putra* in the original. Then follows paragraph 2, in which Vijnaneswara develops the position of the grandmother in the following terms:—

"In the first place the paternal grandmother takes the inheritance. The paternal grandmother's succession immediately after the mother was seemingly suggested by the text before cited. "And the mother also being dead, the father's mother shall take the heritage," (Section 1, paragraph 7). "No place, however, is found for her in the compact series of heirs from the father to the nephew, and that text (the father's mother shall take 'the heritage') is intended only to indicate her general competency for inheritance; she must, therefore, of course, succeed immediately after the nephew; and thus there is no contradiction."

Paragraph 3 then states in general terms that after the grandmother the *sapindas* of the same paternal stock, viz., "the paternal grandfather and the rest inherit the estate, for *bhinna-gotra sapindas* (i.e., *sapindas* belonging to another stock) are indicated by the term *bandhu*" (dealt with in section 6).

Paragraphs 4 and 5 deal specifically with the succession of the *samanagotra sapindas* and run as follows:—

"(4) Here on failure of the father's *descendants*, the heirs are successively the paternal grandmother, the paternal grandfather and their sons."

"(5) On failure of the paternal grandfather's line, the paternal great grandmother, the great grandfather, his sons and their *issue*, inherit. In this manner must be understood the succession of the *samanagotra sapindas*.""

It is clear from the observations of both Mr. Mandlik and Dr. Jolly (7) that Mr. Colebrooke in his translation of paragraph 5 has omitted towards the end the important words "up to the seventh," which makes a material difference in the sense of the passage.

Mr. Mandlik translates the last sentence as follows: "In this manner up to the seventh [*sapinda*] the taking of wealth by the *samanagotra sapindas* should be known." Only instead of the expression *samanagotra*, which is in the original, he uses the abbreviated term *sagotra*.

Paragraph 6 then provides as follows:—

"(6) If there be none such, the succession devolves on *samanodakas*, and they must be understood to reach the seven degrees beyond *sapindas*, or else as far as the limit of knowledge and name extend. Accordingly Vrihat Menu says: 'The relation of the *sapindas* ceases with the seventh person, and that

(7) Mandlik's Hindu Law, p. 379; Dr. Jolly's Tagore Law Lectures, p. 124.

of *samanodakas* exta s to the fourteenth degree, or as some affirm, it reaches as far as the memory of birth and name extends.' This is signified by *gotra.*"

It is contended on behalf of the appellant on the strength of these several passages that the word "son" used in conjunction with brothers must be literally construed, for otherwise, it is urged, the position assigned to the grandmother in the order of succession would be displaced. The effect of this argument (which by parity of reasoning must apply also to uncles), if well founded, is that the succession in the father's or grandfather's line must cease *ipso facto* on the failure of descendants of the second degree, and the inheritance must be diverted to another line ascending first to the female ancestor.

In their Lordships' opinion it begs the very question which they have to determine, viz., in what sense Vijnaneswara has used the term "son" in these passages; and that question can be answered only first by examining his own method of employing the word, and secondly, by inquiring in what sense other Hindu jurists of the same school or cognate schools have understood the expression. *Before proceeding with their examination of* Vijnaneswara's own words, their Lordships desire to make one observation, as it strikes them, regarding the place of the grandmother in his scheme of succession.

In Yajnavalkya's rule, already quoted ,to which Vijnaneswara refers as "the compact series of heirs," the paternal grandmother is not included as an heir. Vijananeswara finds a place for her among the *gotraja*, on the authority of an enunciation of Manu, which he quotes in paragraph 7 of section 1, Chap. II, and which runs thus :--"Of a son dying childless the mother shall take the estate; and the mother also being dead, the father's mother shall take the heritage."

According to Manu, then, if his words are to be literally construed, the paternal grandmother would take immediately after the mother. This difficulty Vijnaneswara himself recognizes; in order to reconcile the conflict between Yajnavalkya, who omits the grandmother altogether from his "compact series of heirs," and Manu, who would place her directly after the mother, he places her somewhat arbitrarily, as Messrs. West and Bühler also indicate, after the "brother's sons." The question, however, whether

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he intended his declaration to be imperative can be solved only by a less free translation than Mr. Colebrooke's. Anyhow, the meaning to be attached to the word "sons" is left subject to explanation.

Now, in paragraph 1 of section 5, where Vijnaneswara says, "if there be not even brother's sons," the word used is *putra*; in paragraph 2, where the grandmother's place is declared, the expression employed is brother's *suta*, a synonym of *putra*. In paragraph 4 again the word *putra* appears to be used in connection with uncles. In paragraph 5, where the expression "his sons and their issue" occurs, the original words are said to be *tat putras*, "his sons," and *tat sunavas*, (1) "their sons."

The word "descendants" in Mr. Colebrooke's translation is in the original "*santana*," which means race, lineage, or posterity, and is still used among Hindus to mean male progeny without limitation. Mr. Justice Telang construes it as meaning "continuation" (2); other learned Sanscritists interpret it to signify "an uninterrupted series" [of progeny or heirs]. Their Lordships have no doubt that Vijnaneswara has used it in the sense of lineal male descendants. *Sunavas*, translated by Mr. Colebrooke as "issue," connotes the same idea.

Having regard to the fact that this great legist, whose logical acumen judging from his work seems to have been remarkable, has used the term *putra* in previous parts of his book on inheritance in a comprehensive and generic sense, their Lordships find it difficult to conceive why he should arbitrarily and without any explanation have used the word towards the end in quite a different and restricted sense, or why, if his intention was to confine the descent in the case of the collaterals to the actual sons of brothers and uncles, he did not employ terms which would have exactly conveyed his meaning, such as *atmaja* or *auras*, which their Lordships understand, mean "son of one's loins" (3). Nor can their Lordships appreciate the argument that the meaning of such

(1) Plural of *sunu* "offspring." *Sunu* is the old Indo-Aryan word which survives in the English "son."

(2) (1892) I.L.R., 16 Bom., 716.

(3) See Mandlik, p. 380; and Sutherland's transl. of the *Dattaka Mimansa* (Stoke's Hindu Law Books, p. 547).

words as *santana* and *sunavas*, which mean lineal male progeny without limitation, should be arbitrarily cut down to two degrees.

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There seems to be great force then in *Sir Robert Finlay's* contention that the limitation is to be found elsewhere. The rule of Manu supplies one limitation:—To three (ancestors) water must be offered, to three funeral cake is given, the fourth (descendant is) the giver of these (oblations), the fifth has no connection with them" (1). The other is deduced by Mr. Harrington (2), the well-known author of the "Analysis," and one of the most erudite judges of the old Sudder Court of Bengal, from the enunciations of Vijnaneswara himself in paragraph 6, section 5, where he declares that the succession of the *samanagotra sapindas* extends "in this manner" to "the seventh degree." It is not necessary in their Lordships' opinion to examine the force of the criticism that has been levelled at Mr. Harrington's construction of Vijnaneswara's dictum, for if the view based on Manu's doctrine or rule be well founded, as the High Court has considered it to be, it would be sufficient to dispose of this appeal.

In this connection their Lordships desire to make another observation. If it be correct, as has been suggested, that the words *putra-pautra* ("son-grandson"), used by Vijnaneswara in section 1, Chap. I, did not comprehend originally a great-grandson, but that it has been included by the commentators, as the *Viramitrodaya* shows, on the strength of analogical reasoning, then, in their Lordships' opinion, the objection to the High Court's reading of text, based on the necessity of strict adherence to a literal interpretation, loses considerably its force, and the Courts are compelled to resort to other texts to extract the meaning of undefined expressions.

Turning now very briefly to the other authorities to which their Lordships' attention was called, they observe that Apararka, another scholiast of Yajnavalkya, who flourished about a century later than Vijnaneswara, dealing with the same text on which the author of the *Mitakshara* has commented at such length, construes, as pointed out by the High Court,

(1) "Sacred Books of the East," Vol. XXV., v 186, p. 30.

(2) See *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae*, 2 Moo. I.A., 132, *see* p. 158.

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the expressions "brother's sons" and "uncle's sons" in a wider sense. That Apararka's authority is acknowledged by the expositors of the Benares school is clear from the fact, to which Mr. Mandlik refers, that Visweswara Bhatta, the author of the *Subodhini*, a commentary on the *Mitakshara*, has used Apararka's work among others for the compilation of his *Madanaparijata*. Parts of Apararka's treatise and of the *Madanaparijata* have been translated by Dr. Sarvadhikari and are to be found in his Tagore Lectures for 1880.

Nanda Pandit, "an esteemed writer of the Benares school," and the author of the noted work on the Law of Adoption, called the *Dattaka Mimansa*, a standard treatise among the followers of the *Mitakshara*, has written commentaries both on the *Mitakshara* as well as on the Institutes of Vishnu, a predecessor of Yajnavalkya, who is frequently quoted by Vijnaneswara. In this latter work, called the *Vijayanti*, in giving the order among the *sagotras*, he states that "in the father's line, on failure of the brother's son, the brother's son's son is heir." And he bases his rule on the prescriptions of Manu already quoted. It is to be noted that this writer, who must have had Vijnaneswara's words in his mind, certainly did not limit the term *putra* to two degrees. Varadaraja, whose authority is said to be great in Southern India, and whose enunciations appear to be received with respect also by the expounders of the Benares school, has given expression to the same view. *Vidyabhusan* Shama Charan Sarkar, a learned Hindu scholar who for many years held the post of principal Oriental Interpreter in the High Court of Calcutta, and at one time occupied the chair of Tagore Law Professor in the Calcutta University, also deals with the subject in his well-known work called the *Vyavastha Chandrika*.

This learned Hindu writer states in Principle 153 that "a brother's grandson succeeds in default of a brother's son," and refers to the decision of the Calcutta High Court in *Kureem Chand Gurain* v. *Oodung Gurain* (13), without taking any exception to its correctness. In the note to the Principle he states the reason why the brother's grandson succeeds on failure of a brother's son in these words: "Because the term brother's

(13) (1866) 6 W. R., 158.

son is inclusive also of the brother's grandson, and because he is *sapinda* and the nearest of the persons understood by the term *gotraja*." The significance, however, of the statement lies in the question which Shama Charan Sarkar propounds in the footnote: "It may be asked that when in law the term "son" (*put-tra*) is inclusive of the grandson and great grandson, why then the term "brother's son" does not include also the "brother's great grandson?" The answer which he gives to his own question is both interesting and instructive. "The answer is," he says, "that in law calculation is made from the son of the common ancestor, which here is the father of both the deceased and his brother, consequently the term "son" (of that ancestor) is inclusive of his great grandson, who is the brother's grandson."

Dr. Raj Kumar Sarvadhikari, whose authority as an expounder of the Hindu Law has been recognized by the Calcutta High Court and this Board, in his Tagore Law Lectures, gives emphatic expression to the view that the word "son" includes three degrees of descendants.

Devananda Bhatta, the author of the *Smriti Chandrika*, whose doctrines, however, are not recognized in Northern India, holds the contrary opinion; and Visweswara Bhatta in the *Subodhini* certainly appears to say that the father's line ceases with the brother's son; and probably the same meaning is to be attached to his statements in the *Madanaparijata*. With regard to those two writers, their Lordships deem it necessary to observe that Devananda Bhatta, who is supposed to have been a contemporary of Apararka, admittedly differs from the author of the *Mitakshara* in several essential rules of law. It seems, to say the least, doubtful whether an enunciation in the *Smriti Chandrika* can be safely applied, except perhaps by way of analogy, to explain a dubious or interminate phrase or term in the *Mitakshara*. The *Subodhini* stands on a different footing; it no doubt professes to be a commentary on the *Mitakshara*, but it is equally clear that in several instances it diverges from the acknowledged interpretations of its doctrines. The views of Visweswara Bhatta and Devananda Bhatta have been propounded with much force by Mr. Mandlik and Golap Chandra Shastri, both of whom take their stand on the literal construction of the word *putra*. This thesis

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has been elaborately worked out by the former writer, but in substance it amounts to this, that as Vijnaneswara has used the expression "son" in conjunction with "brothers" and "uncles" it must be restricted to their direct male issue, and no extension of its meaning is permissible.

Their Lordships agree with the High Court of Allahabad that this reasoning proceeds on a very narrow basis and materially ignores the chief ground on which the opposite doctrine is based. Dr. Raj Kumar Sarvadhikari's construction appears to them to rest on a logical foundation, and his views seem to be consistent and clear. In effect he says that the *Mitakshara* propounds a definite scheme of succession; lineal male descendants of the deceased owner down to and including the third degree, who constitute the first class of propinquous relations (the nearest *sapindas*) inherit in succession in the first instance. In their default the widow and daughter take by express provision of the law. The daughter's son comes in similarly. In their absence the inheritance ascends; each ascending line begins with a female, and each has to be exhausted in accordance with the rule of propinquous *sapinda*-relationship before the next in order can take; so that the parents and "their three successive descendants" take first; then the paternal grandmother and the paternal grandfather and "their three successive decendants" come next, and so on.

It may be noted here that two recent Hindu writers of repute (14), and Dr. Jolly, who was at one time Tagore Law Professor in the Calcutta University, and is one of the translators of "The Sacred Books of the East," are in substantial agreement with Dr. Raj Kumar Sarvadhikari.

As regards the decided cases there seems to be a conflict of opinion between the High Courts of Allahabad and Calcutta on one side and that of Madras on the other. The latter High Court has upheld the narrow construction propounded by the *Smriti Chandrika* and the *Subodhini*, and though it purports to confine its interpretation to Southern India, the opinion it has expressed has a wider application and deserves, therefore, careful attention.

(14) Dr. Jogendra Nath Bhuttacharjea, M.A., D.L., in his Commentaries on the Hindu Law, p. 444; Mr. Jogendro Chander Ghose, Hindu Law, p. 119.

Their Lordships do not consider it necessary to refer to the earlier decisions of the Sudder Dewany Adalut of the North-West Provinces; they think it sufficient to treat the judgement of Mr. Harrington in *Rutcheputty Dutt Jha* (15) as a starting point in the current of decisions in Northern India. The question at issue in that case related to the right of *bandhus* or cognates under the *Mitakshara* to the succession to a deceased person in the presence of a *gotraja*. Mr. Harrington in dealing with the question examined exhaustively the meaning of the word *putra*, and came to the conclusion that it had been used by Vijnaneswara in a generic sence. His judgement was affirmed on appeal to this Board; and there appears to be no challenge of his interpretation of the law. It again received the approval of this Board in *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (16). Perhaps Mr. Harrington's view with regard to the continuation of each line of heirs to the seventh degree is open to the objection that it contravenes the rule of Manu. As already observed, their Lordship do not, however, consider it necessary for the purposes of the present case to consider whether the principle suggested by him is correct or not.

In *Kureem Chand Gurain* v. *Oodung Gurain* (17) also the exact point in issue was not identical with the one involved here, but Mr. Harrington's construction of the word *putra* was accepted; and it was held that in the scheme of the *Mitakshara*, the term "brother's son" includes "brother's grandson."

In *Kalian Rai* v. *Ram Chander* (18) the point at issue directly concerned the position of the brother's grandson in the line of descent, and the learned Judges of the Allahabad High Court (BURKITT and CHAMIER, JJ.) came to the conclusion that under the law of the *Mitakshara*, as accepted and expounded in the Benares school, the brother's grandson had the right of succession to the deceased before it ascended to the second line, viz. the grand-parental line.

This decision has been followed in the case under appeal.

In the Bombay Presidency also the doctrines of the *Mitakshara* are recognized, subject to the interpretation of the *Vyvahara*

(15) (1839) 2 Moo., I. A., 132 (153).

(16) (1870) 13 Moo., I. A., 373.

(17) (1866) 6 W. R., 159.

(18) (1901) I. L. R., 24 All., 128

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Mayukha of Nilkantha Bhatta, and although on many points there is considerable divergence between the Benares and the Maharashtara schools, as regards the question involved in the present case, one decision at least of the Bombay High Court indicates an agreement with the Allahabad High Court.

Mr. Justice Telang, a Sanscritist of high order, in *Rachava* v. *Kalingapa* (19), explains thus the order of descent among the *gotrajas* (enunciated in Chapt. II, section 5, paragraphs 4-5 of the *Mitakshara*), although, as he points out, each ascending line begins with a female (*gotraja*) ancestress.

"In the Mitakshara, Chapter II, section 5, Pl. 4—5, *it is laid down* that the propinquity of *gotrajas* is to be determined by lines of descent—that is to say, the inheritance is to go first in the line" (the word in the original *santana* literally, "continuation") "of the paternal grand-father, then in default of any one in that line, of the paternal great-grandfather, then of the paternal greatgreat-grandfather, and so forth."

The Madras High Court in two cases, named respectively *Suraya Bhukta* v. *Lakhshminarasamma* (20) and *Chinnasami Pillai* v. *Kunju Pillai* (21), has held, as already stated, the direct opposite. The *ratio decidendi* in both judgements, which are elaborate and closely reasoned, is of a two-fold character; in the first place the learnad Judges say that when a word purports to bear two meanings, one primary, the other secondary, it must be understood in the primary sense unless there is anything in the context to show that it was not used in that sense. In the second place they seem to consider the opinions of Devananda Bhatta and of Visveswara Bhatta in the *Smriti Chandrika* and *Subodhini* respectively as conclusively showing that the *Mitakshara* must be taken to limit collateral descent to two degrees in each line. Their Lordships have already made their remarks on these two authorities; they do not feel disposed to attach any canonical authority to the rule of the *Subodhini*. Curiously enough there is no reference in either of the Madras judgements referred to above to a previous decision (22) of the same Court to which Turner, C.J., was also a party. In that case the rule of the *Smriti Chandrika* was not accepted nor was the literal construction of the *Mitakshara* followed. It is usual in such cases where a

(19) (1892) I. L. R., 16 Bom., 716.

(20) (1881) I. L. R., 5 Mad., 291.

(21) (1912) I. L. R., 35 Mad., 152.

(22) *Parasara Bhattar* v. *Rangaraja Bhattar* (1880) I. L. R., 2 Mad., 202.

difference of opinion arises in the same Court to refer the point to a Full Bench, and the law provides for such contingencies. Had that course been followed their Lordships would probably have had more detailed reasoning as to the change of opinion on the part at least of one Judge.

In *Suraya Bhukta* (23) the Judges say they had "consulted their learned colleague, Mr. Justice MUTTUSAMI AYYAR," and acknowledged their obligation to him for his assistance. Their Lordships cannot help remarking that it is an undesirable course, which has not been approved of by this Board, to introduce the opinion of another Judge not a party to the judgement for the purpose of enforcing the conclusion arrived at. The recorded opinion of MUTTUSAMI AYYAR, J., would have been of great value had he been associated in the decision.

However, the two Madras decisions have received the respectful consideration of their Lordships. They have already given reasons for holding that in the *Mitakshara*, as expounded in the Benares school, the word *putra* and its synonym employed by Vijnaneswara in connection with brothers and uncles must be understood in a generic sense as in the case of the deceased owner, and that the descendants in each ascending line, up to the fixed limit, should be exhausted at any rate to the *third* degree before making the ascent to the line next in order of succession.

It seems to their Lordships that there is another ground on which the plaintiff must fail. It is admitted that the defendant confers greater benefit on the deceased by the offerings he makes to the *manes* of the common ancestor. Now, it is absolutely clear that under the *Mitakshara*, whilst the right of inheritance arises from *sapinda*-relationship, or community of blood, in judging of the nearness of blood-relationship or propinquity among the *gotraja*, the test to be applied to discover the preferential heir is the capacity to offer oblations. Mitra Misra, the author of the *Viramitrodaya* (24), an authoritative commentary on the *Mitakshara*, lays down this doctrine in express terms. He says when there are many claimants to the heritage among *gotrajas* and the

(23) (1881) I. L. R., 5 Mad., 291. (24) Golap Chandra Shastri's translation. p. 91. Chap. II, Part I, s. 23A.

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like (25) then the fact of conferring benefits on the proprietor of the wealth by means of the offering of oblations and the like only excludes those that do not confer such benefits." Dr. Raj Kumar Sarvadhikari renders the last part of this passage thus: "The benefit conferred on the late owner by the offering of the cake and the water determines the title to inheritance." (26)

In the case of *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (27) the Board affirmed this rule in the following words:—"When a question of preference arises, as preference is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty."

For these considerations their Lordships are of opinion that the conclusion arrived at by the High Court is well founded, and this appeal should be dismissed with costs. And they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the appellants :—*Ranken Ford, Ford & Chester.*

Solicitors for the respondents :—*Pyke Parrott & Co.*

J. V. W.

APPELLATE CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR *v.* EWAZ ALI AND OTHERS.*

1915
June, 25.

Act No. XLV of 1860 (Indian Penal Code), sections 366 *and* 372—*Kidnapping—Buying or selling minor girls for the purpose of prostitution.*

A low caste girl left her lawful guardian of her own free will and subsequently met the accused Ewaz Ali and lived with him for some time. Later he made her over to certain persons who representing that she was a member of a higher caste, induced a member of such higher caste to take her in marriage and to pay money for her in full belief that such representation was true.

Held that Ewaz Ali was neither guilty of an offence under section 366 of the Indian Penal Code inasmuch as he did not take or entice her away from her legal custody nor of an offence under section 372 of the said Code. *King-Emperor* v. *Ram Chander* (1), and *Empress of India* v. *Sri Lal* (2) followed. *Emperor* v. *Jetha Nathoo* (3) referred to.

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* Criminal Appeal No. 399 of 1915, from an order of B. C. Forbes, Additional Sessions Judge of Muttra, dated the 26th of April, 1915.

(25) Dr. Raj Kumar Sarvadhikari construes the word "like" as meaning "other classes of heirs."

(26) "Tagore Law Lectures," for 1880, p. 629.

(27) 1870 13 Moo., I. A., 373.

(1) (1914) 12 A. L. J., 265.

(2) (1880) I. L. R., 2 All., 694.

(3) (1901) 6 Bom. L. R., 785.

THE facts of this case were as follows:—

Musammat Jamni, a chamar girl about the age of 13 or 14 years, who lived with her husband and his parents, for reasons best known to herself ran away apparently more than once from her home, and on the present occasion she got clean away, and was making her way along the public road to Agra when she was met by the appellant Ewaz Ali who was a road chaukidar. He stopped her and at first decided to take her to the police station. Subsequently, however, after questioning her he agreed to take her into his house and she stayed with him for about a month. At the end of that month he made her over to the three appellants Hira Lal, Shankaria and Musammat Surja. Apparently these persons were well aware of the circumstances of the girl. They bored her nose and made her as far as possible appear to be a *jat* female. They then passed her off as Musammat Surja's niece and made her over to Ghure Jat on payment of Rs. 80, to be married to Sukhdeo. The deception was subsequently discovered, the girl was returned to these three persons and the money demanded back. Apparently it was returned. The girl was then made over to the fifth appellant Tota who is related to Musammat Surja. Tota kept the girl and then finally sold her for a sum of Rs. 70, representing her to be his niece. She was sold to Kallu and Samai Singh for the purpose of being married to the brother of Kallu, for whom a wife was being sought. While Kallu and Samai Singh were taking the girl away to Kallu's village, they were stopped by the chaukidar Sobha Ram and the whole matter was brought to light. Upon these facts the court below convicted Ewaz Ali of an offence under section 366 of the Indian Penal Code and sentenced him to six months' rigorous imprisonment and a fine of Rs. 40.

Babu *Kena Ram Mukerji, as amicus curiæ,* for the accused.

The Government Pleader (Babu *Lalit Mohan Banerji*) for the Crown.

TUDBALL, J.—The five appellants have been convicted by the learned Sessions Judge on the following facts as found by the court below. Musammat Jamni is a chamar girl about the age of 13 or 14 years. She was married and she lived with her husband and his parents. For reasons best known to herself she

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ran away apparently more than once from her home, and on the present occasion she got clean away, and was making her way along the public road to Agra when she was met by the appellant Ewaz Ali, who was a road chaukidar. He stopped her and at first decided to take her to the police station. Subsequently however after questioning her, he agreed to take her into his house and she stayed with him for about a month. At the end of that month he made her over to the three appellants Hira Lal, Shankaria and Musammat Surja. Apparently these persons were well aware of the circumstances of the girl. They bored her nose and made her as far as possible appear to be a *jat* female. They then passed her off as Musammat Surja's niece and made her over to Ghure Jat on payment of Rs. 80, to be married to Sukhdeo. The deception was subsequently discovered, the girl was returned to these three persons, and the money demanded back. Apparently it was returned. The girl was then made over to the fifth appellant Tota, who is related to Musammat Surja. Tota kept the girl and then finally sold her for a sum of Rs. 70, representing her to be his niece. She was sold to Kallu and Samai Singh for the purpose of being married to the brother of Kallu, for whom a wife was being sought. While Kallu and Samai Singh were taking the girl away to Kallu's village they were stopped by the chaukidar Sobha Ram and the whole matter was brought to light. Upon these facts the court below convicted Ewaz Ali of an offence under section 366 of the Indian Penal Code and sentenced him to six months' rigorous imprisonment and a fine of Rs. 40. Hira Lal, Tota, Musammat Surja and Shankaria have been convicted of cheating and have been sentenced—Hira Lal, Tota and Shankaria to one year's rigorous imprisonment each *plus* a fine, and Musammat Surja to six months' rigorous imprisonment. They have all appealed. No exception has been taken to the trial of all these persons together, at one and at the same trial. In regard to Hira Lal, Tota, Musammat Surja and Shankaria, there can be very little doubt as to their guilt, nor do the sentences imposed upon them call for interference. The case of Ewaz Ali is one of doubt. It is quite clear that when he met Musammat Jamni, the girl had got clean away out of the hands of her husband and his parents.

The question is whether he can be said to have taken or enticed the girl out of the keeping of her lawful guardian. In the case of *Emperor* v. *Jeta Nathoo* (1), two Judges of the Bombay High Court pointed out the difference between the English Law on the subject and the Indian Law and the difference in meaning between the word "keeping" and the word "possession." One will have very little difficulty in fully agreeing with the decision in that case in view of the actual facts therein. There a girl under 16 years of age went out in search of work. She was induced by a deceitful promise of obtaining work to go to a certain house. There can be no doubt that in that case the offence of kidnapping was committed. In the present case the girl had voluntarily left the keeping of her guardian with intention to remain out of that keeping, and the accused Ewaz Ali, probably with full knowledge of the circumstances, gave her a home and finally transferred her to the keeping of Hira Lal, Shankaria and Musammat Surja on receipt of the sum of Rs. 40. It is very difficult under these circumstances to say that he either *took* or *enticed away* the minor *out of the keeping* of the lawful guardian. The case is very much akin to that of *King-Emperor* v. *Ram Chander* (2). In that case also a girl under sixteen years of age left the guardianship of her husband and father-in-law of her own free will and not for the first time, and then subsequently stayed with the accused quite voluntarily and without any force having been exercised upon her. The Judges before whom that case came for decision held that the act did not amount to taking or enticing the girl out of the keeping of her lawful guardian. In the judgement it was remarked as follows:—"On the admitted facts the leaving and the removal out of the keeping of the lawful guardian was the act of the girl herself long before she met the accused." In view of the above remarks in that case, it seems to me that the conviction of Ewaz Ali under section 366 cannot possibly stand. The question arises whether Ewaz Ali could or could not be convicted of an offence under section 372, that is, selling a minor with intent that such *minor shall be employed or used for the purposes of prostitution or* for any unlawful and immoral purpose, or knowing it to be likely

(1) (1904) 6 Bom. L. R., 785. (2) (1914) 12 A. L. J., 205.

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that such minor will be employed or used for any such purpose. No doubt Ewaz Ali was well aware of what was about to happen to the girl. She was to be made to resemble as far as possible a *jat* female, and to be used for the purpose of cheating other persons and obtaining money. That no doubt was unlawful, but for the purpose of the section the object must also be immoral. The point is covered by the decision of the Full Bench of this Court in *Empress of India* v. *Sri Lal* (1). There again a low caste girl, as in the present case, was falsely represented by certain persons, as being a member of a higher caste, and another member of such higher caste was induced thereby to take her in marriage and to pay money for her in the full belief that such representation was true. It was held by the Full Bench that the accused could not be convicted on these facts of offences under sections 372 and 373 of the Indian Penal Code. The decision covers the facts of the present case and I am bound to hold that Ewaz Ali committed no offence under section 372 or 373 of the Indian Penal Code. It is clear that he did not attempt to cheat Hira Lal, Shankaria and Musammat Surja.

Under these circumstances, I must allow the appeal of Ewaz Ali. I set aside his conviction and sentence and direct that he be forthwith released. The appeals of the other appellants are all dismissed.

Conviction of Ewaz Ali quashed.

REVISIONAL CRIMINAL.

1915
June, 29.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Piggott.

EMPEROR v. BATESHAR AND OTHERS.*

Accused summoned without the complainant being examined—Irregularity—Proceedings not vitiated—Hurt both simple and grievous—Cumulative sentences—Legality of.

The complainants made a complaint to the police to the effect that the accused beat them causing grievous hurt. The police did not send up the case and the complainants applied to the Magistrate, who sent for the police papers and summoned the accused without examining the complainants. On the date fixed the complainants were absent and the accused were discharged.

* Criminal Revision No. 341 of 1915, from an order of Mubarak Husain, Sessions Judge of Cawnpore, dated the 26th of April, 1915.

(1) (1880) I. L. R., 2 All., 694.

Later in the day the complainants appeared and explained their delay, and the Magistrate again gave them time to produce evidence. He summoned the accused, found them guilty and sentenced them to imprisonment. *Held* that the course the Magistrate adopted was irregular but did not vitiate the entire proceedings.

Held further, that where different persons are injured, grievous hurt being caused in one case and simple hurt in others, it is competent for the court to impose separate and accumulative sentences.

THE facts of this case are fully set out in the judgement.

Mr. *W. Wallach*, for the applicants.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

RICHARDS, C. J., and PIGGOTT, J. :—This is an application in revision. The facts are briefly as follows:—A complaint was made to the police, in which the complainant complained that he and certain other persons had been beaten by the present applicants, and that one of them had suffered injuries amounting to grievous hurt. The police do not appear to have been very anxious to initiate proceedings. The result was that the complainant came before Mr. Williamson, a Magistrate of the first class, with what amounted to a "complaint," though no doubt it was to a certain extent also a complaint against the police for not moving in the matter. This was on the 8th of February. The Magistrate made an order in the following terms:—"Papers of the police investigation to be produced before me on the 16th of February. The complainants, if they wish to prosecute their case independently of the police, should produce evidence on that date and also summon the accused." This order was not regular. There was no objection of course to the Magistrate sending for the police papers. On the contrary it was a very correct thing for him to do; but under section 200 of the Code of Criminal Procedure he ought *at once*, and before he summoned the accused, to have examined the complainant on oath. On the 16th of February, for some reason or other, the complainants did not turn up. The accused were in court and the Magistrate made an order of discharge under section 259 of the Code of Criminal Procedure. The very same day the complainants turned up and evidently explained to the learned Magistrate how it was that they were unable to be present in court. Thereupon the Magistrate made the following order:—"The applicants appeared after

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the rising of the court, having arrived by a late train. In view of the police report and the departure of the accused it will be sufficient to allow applicants so much grace as to give them an opportunity of showing under section 202 of the Code of Criminal Procedure, whether they can support their case by evidence. To February the 23rd for this purpose." This order is dated the 17th, although the corresponding vernacular order in the order sheet is dated the 16th. On the 23rd of February, the complainant and four witnesses were examined and process was ordered to issue for the accused. The proceedings against them began on the 8th of March. The Magistrate again on the 16th or 17th of February, in a lesser degree made the same mistake as he had made in the previous order. He did not *at once* examine the complainants on oath. It is contended in revision that the conduct of the Magistrate amounts to such an illegality that it vitiates the entire proceedings. It is admitted, however, that according to the rulings and practice of this Court an order of discharge is no bar to the court taking cognizance of the case upon a fresh complaint or a fresh police report, notwithstanding that the complaint or police report refers to the very same offence in respect of which the accused had previously been discharged. It follows from this that if the court had never made the order, dated the 17th of February, and that on the 23rd of February, the complainant had come to the Magistrate, explained to him why it was he had been unable to attend on the 16th, and had then made an oral complaint to the Magistrate, the proceedings which led to the issue of process and the subsequent trial would all have been regular. It seems to us that the irregularity in the previous orders cannot under the circumstances of the present case be said to vitiate the proceedings. At the same time we wish very strongly to impress upon the learned Magistrate that the provisions of the Code as to procedure ought to be strictly complied with. Non-observance of the provisions of the Code leads to much confusion and waste of public time, not to speak of involving the parties in unnecessary expense. Under the circumstances of this case we see no sufficient ground for setting aside the conviction on the ground of the irregularity in the issuing of process to the accused.

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The second point raised in the application is that cumulative sentences were illegal. It seems to us that there is no force in this contention. Different persons were injured, grievous hurt was caused in one case and simple hurt in others. Therefore it was competent for the court to impose separate and accumulative sentences.

The only other matter is a question of severity of sentence. The injuries in most of the cases were simple. In one case there was a broken finger and the infliction on the head of a wound which laid bare the bone. No doubt these injuries were of a serious nature. There are, however, some circumstances connected with the case into which it is unnecessary to go in detail, but we have considered these circumstances and we think that the ends of justice will be met by making the sentences passed run concurrently. We order that the sentences of imprisonment passed on Bateshar and Mathura shall run concurrently instead of consecutively. In all other respects we dismiss the application. The applicants must surrender to their bail.

Order modified.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr Justice Piggott.

1915 June, 20.

KAULESHAR PRASAD MISRA (DEFENDANT) v ABADI BIBI (PLAINTIFF) AND GOBIND NARAIN SINGH AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act), section 54—Sale—Condition attached to the payment of purchase money—Public policy.

Where a deed purporting to be a sale-deed contained a stipulation that the price should be paid within one year, provided that possession was obtained within that time; but if possession was not obtained, then the payment of the price should be postponed, and further that in the event of the vendee not getting the property, the price should not be paid at all, *held* that the transaction amounted to a sale within the meaning of section 54 of the Transfer of Property Act, and the condition postponing the payment of the consideration was not contrary to public policy.

THE facts of this case were as follows:—

The plaintiff came into court alleging that the property in dispute belonged to one *Ali Ahmad who died in 1910, leaving*

* Second Appeal No. 829 of 1914, from a decree of Rama Prasad, District Judge of Ghazipur, dated the 20th of April, 1914, confirming a decree of Muhammad Husain, Subordinate Judge of Ghazipur, dated the 12th of December, 1913.

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certain heirs. The heirs executed a sale-deed in favour of the plaintiff on the 4th of July, 1913. In the sale-deed of the 4th of July, 1913, there was a stipulation that the price should be paid within one year, provided that possession was obtained within that time; that if possession was not obtained, then the payment of the price should be postponed, and further that in the event of the vendee not getting the property, the price should not be paid at all. The contesting defendant's case was that Ali Ahmad had executed a sale-deed in favour of one Idan as far back as 1889. She died in 1912, leaving certain heirs surviving her, who sold the property to the defendant on the 30th of June, 1913. The suit of the plaintiff was decreed by the lower courts and the defendant appealed to the High Court.

Mr. *M. L. Agarwala*, Munshi *Gulzari Lal* and Munshi *Haribans Sahai*, for the appellant.

The Hon'ble Mr. *Abdul Raoof*, The Hon'ble Dr. *Tej Bahadur Sapru* and Dr. *S. M. Sulaiman*, for the respondents.

RICHARDS, C. J., and PIGGOTT, J.:—This appeal arises out of a suit brought by the plaintiff for possession of a bungalow and compound. The plaintiff's title is as follows: The property, they say, belonged to one Ali Ahmad, who died in March, 1910, leaving certain heirs who are the defendants of the fourth party. They made a deed in her (plaintiff's) favour on the 4th of July, 1913. The defendant's title on the other hand is as follows: Ali Ahmad, they alleged, executed a sale-deed in the year 1889, in favour of one Musammat Idan. Musammat Idan died in 1912, leaving as her heir the defendant of the third party Ramzan, and Ramzan by a sale-deed, dated the 30th of June, 1913, sold the property to the appellant, Pandit Kauleshar Prasad Misra. Both the courts below have decreed the plaintiff's claim. Both courts have found that the sale-deed of 1889 was a fictitious sale-deed under which no possession passed, or was intended to pass, that Musammat Idan was the mistress of Ali Ahmad, that Ali Ahmad continued to be the owner and in possession of the property notwithstanding the sale-deed. This, it seems to us, is a finding of fact which we in second appeal are bound to accept.

The appellant, however, contends that there is a flaw in the plaintiff's title. In the sale-deed of the 4th of July, 1913, there is a stipulation that the price should be paid within one year provided that possession is obtained within that time; that if possession was not obtained, then the payment of the price should be postponed, and further, that in the event of the vendee not getting the property, the price should not be paid at all. It is contended that the consideration for this contract is opposed to public policy, being a gambling transaction. It is further contended that there being a condition attached to the payment of the consideration the transaction is not a sale within the definition of that expression contained in section 54 of the Transfer of Property Act. In our opinion there is nothing contrary to public policy in providing that the payment of the consideration should be postponed in certain events and that it should not be paid at all in the event of the property being lost. It certainly was not a gambling transaction. Section 54 defines a "sale" as "a transfer of ownership in exchange for a price paid or promised, or part paid and part promised." In our judgement the stipulations in the present deed did not prevent the transaction amounting to a "sale" within the definition.

It is next contended that Ramzan, the appellant's vendor, was the ostensible owner of the property in suit with the consent, express or implied, of the real owners, and that the appellant took all reasonable care to ascertain that Ramzan had power to make the transfer in his favour. The courts below have found that Ramzan was not the ostensible owner with the consent, express or implied, of the real owners, and they have further found that under the circumstances of the present case the appellant did not take reasonable care to ascertain the title of his vendor. In our opinion these are questions of fact, upon which we must accept the findings of the lower appellate court in second appeal.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

1915
July, 1.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Piggott.

KESAR KUNWAR (DEFENDANT) *v.* KASHI RAM (PLAINTIFF) AND KEWAL SINGH AND OTHERS (DEFENDANTS)*.

Mortgage—Usufructuary mortgage—Simple mortgage—Covenant to pay money due on simple mortgage before redemption of the usufructuary mortgage—Suit on second mortgage barred by limitation—Redemption of usufructuary mortgage.

Plaintiff executed a usufructuary mortgage and later executed a simple mortgage in favour of the defendant. In the latter bond he covenanted not to redeem the usufructuary mortgage till he had paid the money due on the second bond. The present suit was brought to redeem the usufructuary mortgage at a time when if the defendant had to sue on the simple mortgage it would have been barred by limitation. *Held* that the plaintiff was entitled to redeem the first mortgage without paying the money due on the second bond.

THE facts are as follows:—

The plaintiff was the purchaser of the interests of one Bhim Singh who on the 13th of February, 1880, executed a usufructuary mortgage to secure a sum of Rs. 900 for a term of four years in favour of Kripa Ram, the deceased husband of the defendant, Musammat Kesar Kunwar. In that bond it was stipulated that the mortgagor was not to get any profits nor the mortgagee any interest, and that at the end of the specified period the mortgagor would be entitled to redeem the property if he paid the mortgage-money only at the end of *Jeth*. The plaintiff deposited Rs. 900 on the 28th of May, 1912, in court, but the defendant Musammat Kesar Kunwar declined to accept it. Thereupon the plaintiff brought this suit to redeem the mortgage. Musammat Kesar Kunwar, contended, *inter alia,* that the mortgagor Bhim Singh, in continuation of his first mortgage, executed another mortgage-deed for Rs. 95 in favour of Kripa Ram on the 22nd of July, 1882, and that unless the plaintiff paid the amount of the bond tacked on to the first mortgage, he could not redeem that mortgage alone. The stipulation in the second bond was as follows:—"I will pay the money with interest at Rs. 2 per cent. per mensem. I hypothecate and mortgage in this bond the two biswa zamindari share in mauza Parsari, . . . which is mortgaged with possession to the creditor, till the payment of this money. It

* Second Appeal No. 931 of 1914, from a decree of Banke Behari Lal, Subordinate Judge of Aligarh, dated the 21st of April, 1914, reversing a decree of Jogendro Nath Chaudhri, Munsif of Etah, dated the 26th of September, 1912.

is further stipulated that I should first pay the money due under this bond, and after that I should pay the mortgage-money." The Munsif held that the intention of the parties was to consolidate the amounts of the two mortgages and that, consequently the plaintiff was not entitled to redeem the usufructuary mortgage alone. He dismissed the suit as the plaintiff did not seek to redeem the second mortgage nor deposited the additional court fee. The Subordinate Judge on appeal held that there was no covenant in the bond that the "moneys due under both the mortgages were to be paid simultaneously," and therefore, "the amounts of the two mortgages were not consolidated, but under the terms of the second mortgage, the plaintiff could not ask for redemption of the earlier mortgage so long as the second mortgage subsisted." He further held that no term being fixed in the second bond for payment, it was payable on demand, and time ran from the date of the bond, twelve years expired in 1894 and the bond did not subsist Accordingly he allowed the claim. Defendant, Musammat Kesar Kunwar, appealed.

Babu *Sarat Chandra Chaudhri*, for the appellant.—

The bond of 1882 is a tacking bond, and reading the bond as a whole the intention clearly was that the amounts due under the two mortgages were to be consolidated. There is all the greater reason to hold that a consolidation was intended because the second bond was payable before the first. The suit is for redemption of the first mortgage, and it will be inequitable to allow the plaintiff to redeem it alone without paying the money due under the second bond. The same property is mortgaged in both the bonds, and unless the parties contemplated that the money was to be paid simultaneously the covenant would be meaningless. Without an express covenant to that effect, the mortgagor would be entitled to redeem the second mortgage at any time and the mortgagee could sue on foot of it whenever he liked within 12 years from the date of the bond. Unless the parties intended that the two mortgages were to be simultaneously redeemed, there was no conceivable motive for having a clause like the one now under consideration inserted in the bond. Whenever a tacking bond like this is executed the intention is that the mortgage to which it is tacked and that bond itself should be redeemed simultaneously.

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KUBAR KUNWAR *v.* KASHI RAM.

The case of *Birjlal Singh* v. *Bhawani Singh*, (1) is on all fours with the present case and on interpretation of a covenant very much similar to the covenant in this deed, the Judges came to the conclusion that the two mortgages must be redeemed simultaneously; *Ranjit Khan* v. *Ramdhan Singh* (2); *Dorasami* v. *Venkataseshayyar* (3); *Coote's Mortgage*, 8th Ed., Vol. II, pp. 1174—1175. As for the further point that the bond does not subsist because a suit on it would be barred now it is submitted that limitation does not affect the defence based on the bond; *Rangnath Sakharam* v. *Govind Narasinv* (4); *Lakshmi Doss* v. *Roop Laul* (5). Moreover, the mortgagee being entitled to consolidate no question of limitation arises.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondent was not heard.

RICHARDS, C. J., and PIGGOTT, J.:—This appeal arises out of a suit brought to redeem certain property which was made the subject of a usufructuary mortgage, dated the 13th of February, 1880. The principal sum secured was Rs. 900, and the mortgage deed expressly provided that the usufruct was to go against the interest and that the mortgagor should not be entitled to an account from the mortgagee of the profits. The defence to the suit was that there had been a subsequent mortgage, dated the 7th of July, 1882, and that under the terms of this mortgage plaintiff could not succeed in the present suit without first paying off the amount due for principal and interest under the last mentioned mortgage. The first court gave effect to the defence and dismissed the suit. The lower appellate court allowed the appeal.

The second mortgage was for a sum of Rs. 95, repayable with interest at the rate of thirty per cent. per annum. The deed, after reciting the facts that the property had been previously mortgaged, contains the following provisions:—"It is further stipulated that I should first pay the money due under this bond, and after that I should pay the mortgage money." It is clear from the terms of this mortgage taken in conjunction with the fact that the whole usufruct was to be applied to the keeping

(1) (1910) I. L. R., 32 All., 651.
(2) (1909) I. L. R., 31 All., 482, 485, 488.
(3) (1901) I. L. R., 25 Mad., 108.
(4) (1904) I. L. R., 28 Bom., 639.
(5) (1906) I. L. R., 30 Mad., 169.

down of interest upon the first mortgage, that the second mortgage was in fact a simple mortgage. So long as it remained unpaid the interest would accumulate at the rate of thirty per cent. per annum, and according to the covenant the money due thereunder for principal and interest must be paid before the mortgagor redeemed the first mortgage. No principal or interest had ever been paid upon foot of this second mortgage. At the date of institution of the present suit, a suit to enforce payment of the second mortgage would be barred by limitation, unless it can be said that on the true construction of the deed it was not open either to the mortgagor to pay off the amount due, or to the mortgagee to bring a suit until such time as the mortgagor was ready to redeem the earlier mortgage. It seems to us absolutely clear that if the mortgagor, a year after the execution of the second mortgage, had tendered the sum of Rs. 95, *plus* a year's interest thereon, the mortgagee would have been legally bound to accept the same. He certainly could not have refused the tender by reason of the stipulation in the second bond that the mortgagor should pay the money due thereunder before he paid the mortgage on the earlier bond. Just in the same way we consider that if the mortgagee had brought a suit to enforce the second bond, the mortgagor could not have successfully pleaded that such suit was premature. The result is that we must take it that had a suit been brought on the 8th of August, 1912, (that is the day on which the written statement was filed), on the second mortgage the same would have been barred by limitation. We will assume that had the plaintiff brought the present suit before the second mortgage was barred by limitation, and had the defendant pleaded that the first mortgage could not be redeemed until after the second had been paid off the plea would have been a good one. The question remains whether such a plea is still good notwithstanding that the defendant is barred from maintaining any suit to enforce the second mortgage. In effect the defendant is asking the court to enforce against this property a claim which is barred by time. We think that this cannot be done and that the plaintiff is now entitled to recover possession of the property

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upon payment of the amount secured by the original mortgage. We dismiss the appeal with costs.

Appeal dismissed.

1915 *July*, 2.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Piggott.

PREM NATH TIWARI AND ANOTHER (DECREE-HOLDERS), *v.* CHATARPAL MAN TIWARI AND ANOTHER (JUDGEMENT-DEBTORS) *

Civil Procedure Code (1908), *section* 48—*Decree in favour of minors—Application for execution 12 years after date of decree—Limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *section* 6.

Section 6 of the Indian Limitation Act, 1908, only refers to periods of limitation prescribed by the Act itself and has no application to a case where the decree is barred by the provisions of section 48 of the Code of Civil Procedure, 1908. Minority, therefore, is not a ground of exemption from the operation of limitation provided for by section 48 of the Code of Civil Procedure. *Moro Sadashiv* v. *Visaji Raghunath* (1) dissented from. *Jhandu* v. *Mohan Lal* (2) and *Ramana Reddi* v. *Babu Reddi* (3) followed.

THE facts of this case were as follows:—

A decree was obtained by the appellants on the 22nd of May, 1901. They were minors at that time as well as at the time of this application. There were several applications for execution leading up to one on the 6th of February, 1912, which was dismissed on the 3rd of December, 1912. The present application for execution was made on the 27th of May, 1913. The present application was thus a few days beyond twelve years from the date of the decree. The application was contested on the ground that it was barred by limitation. The first court gave effect to the plea, but the lower appellate court allowed the execution. The minor decree-holders appealed to the High Court.

Babu *Sarat Chandra Chaudhri* and Munshi *Iswar Saran* for the appellants.

Babu *Girdhari Lal Agarwala*, for the respondents.

RICHARDS, C.J., and PIGGOTT, J.:—This is an execution appeal. It appears that a decree was obtained by minors on the 22nd of May, 1901. There were several applications for execution leading up to one on the 6th of February, 1912, which was dismissed on the 3rd of December, 1912. The present application for execution was made on the 27th of May, 1913. It thus appears that the last

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* Appeal No. 37 of 1915, under section 10 of the Letters Patent.

(1) (1891) I. L. R., 16 Bom., 536. (2) Punj. Rec., 1894, C.J., 489.

(3) (1912) I. L. R., 37 Mad., 186.

application for execution was more than 12 years from the date of the decree. The judgement-debtors resisted execution relying on section 48 of the Code of Civil Procedure. This section provides that "where an application to execute a decree, not *being a decree granting an injunction has been made, no order* for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years" from the various dates specified in the section. It is admitted that had the decree-holders been persons of full age the present application would be clearly barred. It is, however, contended that being minors they are still entitled to execute the decree. The first court allowed the objection of the judgement-debtors. The lower appellate court reversed the order of the court of first instance. The learned Judge of this Court reversed the order of the lower appellate court and restored the order of the court of first instance.

Section 6 of the Indian Limitation Act, No. IX of 1908, provides as follows :—" Where a person entitled to institute a suit, or make an application for the execution of a decree, is at the time from which the period of limitation is to be reckoned, a minor or insane or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed *from the time prescribed therefor in the third column of the first schedule.*" It is admitted that the provisions of this section do not help the present decree-holders. It might have given them a right to execute their decree notwithstanding the expiration of the three years limit laid down in article 182 of the schedule I, but it does not give them any exemption from the provisions of section 48 of the Code of Civil Procedure. In the case of *Moro Sadashiv* v. *Visaji* (1) SERGEANT, C. J., held in a case similar to the present that section 7 of the former Limitation Act (which corresponds to section 6 of the present Limitation Act), only applied to cases dealt with by the statute itself.

He, however, goes on to say :—" The question referred to us must be decided by the general principles of law as to the disability of minors, to which the provisions of the Code of Civil

(1) (1891) I. L. R., 16 Bom., 536.

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PREM NATH TIWARI v. CHATARPAL MAN TIWARI.

Procedure must, in the absence of anything to the contrary, be deemed to be subject. The general principle is that time does not run against a minor; and the circumstance that he has been represented by a guardian does not affect the question." If we were to accept this statement of the law it would mean that a minor party to a suit through his guardian, whether as plaintiff or as defendant, is not bound to take any of the steps provided by the Code of Civil Procedure within the periods therein limited. For example it would be open to a minor judgement-debtor to reopen by way of appeal a question which had been finally decided years before. Just in the same way if a suit had been decided against a minor he might delay presenting his appeal for many years. The learned Judge of this Court has referred to the judgement of Sir MEREDITH PLOWDEN in *Jhandu* v. *Mohan Lal* (1), and also to the decision *Ramana Reddi* v. *Babu Reddi* (2). In our opinion the judgement of the learned Judge of this Court was correct and ought to be affirmed. We dismiss the appeal with costs.

Appeal dismissed.

1915
July, 3.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Piggott.

QASIM BEG (PLAINTIFF) *v.* MUHAMMAD ZIA BEG (DEFENDANT.)*

Act No. IX of 1908 (*Indian Limitation Act*), *schedule I, articles* 91, 120—*Suit to set aside a mortgage—Mortgage deed executed without consideration and not intended to be operative—Cause of action.*

A suit to set aside a mortgage-deed was brought nine years after its execution on the ground that the defendant only recently threatened to bring a suit on the basis of it, though when it was executed it was never intended to be acted upon, no consideration having passed for it. *Held* that the suit was barred by limitation no matter whether article 91 or article 120 of the first schedule to the Limitation Act applied to the suit, the facts entitling the plaintiff to have the document set aside having been known to him from the very outset. *Singarappa* v. *Talari Sanjivappa* (3) and *Vithai* v. *Hari* (4) referred to.

THE facts of this case were as follows:—

The plaintiff brought this suit for a declaration that a mortgage-deed executed by him in favour of the defendant is null and void. He alleged that he and the defendant are relations, and that with

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* Second Appeal No. 941 of 1914, from a decree of C. E. Guiterman, Additional Judge of Moradabad, dated the 28th of March, 1914, reversing a decree of Harihar Prasad, Munsif of Haveli, dated the 28th of November, 1913.

(1) Punj. Rec., 1894 C. J., 489.
(2) (1912) I. L. R., 37 Mad., 186.
(3) (1904) I. L. R., 28 Mad., 349.
(4) (1900) I. L. R., 25 Bom., 78.

the object of defeating creditors he executed a fictitious mortgage-deed in favour of the defendant, that no consideration passed upon foot of it and that the document has ever since its execution remained with him. The bond was executed on the 19th of October, 1904. The defendant has of late assumed a hostile attitude towards him and threatened on the 1st of July, 1913, to sue on the basis of the bond. Hence the plaintiff apprehends injury to his interests and has brought the suit. The defence, *inter alia,* is that the suit is barred by limitation. The court of first instance decreed the suit. On the question of limitation it held that the suit was not barred inasmuch as the plaintiff's allegation being that the bond was a bogus bond and no consideration passed for it and that the defendant now threatened to use it as genuine, no cancellation of the bond would be necessary if the allegations were found to be true. On appeal the Additional District Judge reversed the decree of the Munsif and dismissed the suit as time-barred. He says:—"The suit is one under section 39, Specific Relief Act. Article 91 of the Limitation Act applies. The facts entitling the plaintiff to sue were known to him when he executed the document. In this view the period was three years, and the suit is clearly, time-barred." He also held that the suit was also barred if article 120 applied. The plaintiff appealed to the High Court.

Mr. *Agha Haidar,* for the appellant:—

The view of the lower appellate court that time began to run from the moment when the document was executed is wrong. There is a good deal of difference in the language used in article 91 of the Act of 1877 and that used in the corresponding article 92 of the Act of 1871. The present Limitation Act has reproduced the language used in the Act of 1877. Time, according to the present Act and the Act of 1877, runs from the date "when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him," and not, as in the Act of 1871, from the date of the execution of the document. Consequently when it was positively known to the plaintiff that this document which at its inception was treated as fictitious and inoperative became dangerous to him that the cause of action accrued, and this date

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was the 1st of July, 1913; *Jagardeo Singh* v. *Phuljhari* (1). It has been held that whether article 91 or article 120 applies, the starting point of limitation in either case is the same; *Sham Lal Mitra* v. *Amarendro Nath Bose* (2) *Singarappa* v. *Talari Sanjivappa* (3); *Vithai* v. *Hari* (4).

Mr. *B. E. O'Conor*, for the respondent, was not called upon to reply.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiff sought a declaration that a bond, dated the 5th of October, 1904, and executed by him mortgaging certain property being without valid consideration is ineffectual, and that the defendants had no right under it. The court of first instance decreed the claim. The lower appellate court allowed the appeal and dismissed the suit.

The plaintiff's own case is that the bond in question was executed in favour of the defendant, who was a relatoin of his, for the purpose of defeating actual or possible creditors. The present suit was not instituted until the 26th of July, 1913, that is to say, about nine years after the execution. The lower appellate court has dismissed the suit solely on the ground that it is barred by limitation.

Article 91 provides that a "suit to cancel or set aside an instrument not otherwise provided for shall be brought within three years from the time when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him."

If Article 91 is appropriate, it seems to me that the facts which entitled the plaintiff to bring the present suit were that no consideration had passed and that the bond was only executed for the purpose of defeating his creditors. These facts were known to the plaintiff the day he executed the bond. Article 120 provides that "where no period of limitation is provided elsewhere in the schedule, the suit must be brought within six ysars from the time when the right to sue accrues." If Article 120 is appropriate, it seems to me that it is clear that what gave the plaintiff a right to bring the present suit was that there was no consideration paid or intended to be paid. His right to sue therefore accrued at

(1) (1908) I. L. R., 30 All., 375.
(2) (1895) I. L. R., 23 Calc., 460.
(3) (1904) I. L. R., 28 Mad., 349.
(4) (1900) I. L. R., 25 Bom., 78.

the very time when he executed the bond and his suit had to be brought within six years. If it were necessary to decide which article of the Limitation Act applies, I am inclined to think article 91 is the appropriate article. If the bond was altogether fictitious it ought to be cancelled and a note made of its cancellation in the Registration office as provided by section 39 of the Specific Relief Act. Cancellation of the bond was the real relief to which the plaintiff was entitled if he proved his case and if the suit was brought within time.

There are many cases in which a party might be entitled to a declaration that a deed did not bind him while he would not be entitled to have the deed cancelled. It is contended that whether we apply article 91, or article 120, the fact which entitled the plaintiff to have the instrument cancelled or the time when his right to sue accrued was when he apprehended that a suit would be brought against him. It seems to me that though his apprehension may have been a reason for bringing the suit it was neither the fact which entitled him to have the instrument cancelled within the meaning of article 91, nor was it by reason of his apprehension that the right to sue accrued to him within the meaning of article 120.

There have been a number of cases cited none of which seem to me to be very much in point, except the case of *Singarappa* v. *Talari Sangjivappa* (1). The learned Judges seem to have suggested that the right to have a document set aside was when the party had reasonable apprehension that such instrument, if left outstanding, would cause him serious injury, and they referred to section 39 of the Specific Relief Act. In my opinion section 39 merely states under what circumstances a plaintiff can bring a suit for the setting aside of a document. The section is clearly subject to the provisions of the Limitation Act. In my opinion the decision of the court below was quite correct and ought to be confirmed. I wish to say, in conclusion, that I am deciding the case on its own facts and circumstances.

PIGGOTT, J.—In concurring with the decision of the learned Chief Justice in this case I wish to add a few remarks, principally because of the authorities which have been quoted on the other

(1) (1904) I. L. R., 28 Mad., 349.

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side, and I would mention the case of *Vithai* v. *Hari* (1) in addition to the Madras case referred to by the Honourable Chief Justice. I mention that case as the type of a number of others in which essential relief sought by the plaintiff was the recovery of possession, or in which at any rate a cause of action was afforded by actual interference with the plaintiff's possession. I think all cases of this sort are easily distinguishable from the one now before us. On its facts even the case reported in I. L. R., 28 Mad., 349, is distinguishable from the present, on the ground that the deed sought to be set aside was a deed of sale, and that it was an essential part of the plaintiff's case that he had continued in possession in spite of the execution of that deed, and that he got his cause of action owing to an attempt on the part of the defendant to interfere with his possession. The line of reasoning, however, adopted by the learned Judges of the Madras High Court in that case is in favour of the contention of the appellant now before us. With all respect to the learned Judges, I can only say that a general application of the principles suggested in this decision, and in particular their application to the present case, would amount to something like a *reductio ad absurdum* of the relief intended to be allowed by the Legislature by means of declaratory suits. In a case like the present the plaintiff, the executant of the disputed document, was fully entitled to wait quietly at home until the defendant brought a suit to enforce the mortgage. As against such a suit all the pleas put forward in this case would have been available as a defence. The period of limitation for a suit on the mortgage deed had barely three more years to run when the plaintiff came into court with the present suit. The object of allowing a declaratory suit to be brought at all in such circumstances as the present is for the perpetuation of testimony when the plaintiff is apprehensive that, if he waits for the opposite party to take action against him, evidence at present readily available would become difficult or impossible to obtain. I think that is why a narrow period of limitation was prescribed for suits to which article 91 of the Indian Limitation Act applies. There is no doubt that attempts are frequently made to secure a longer period of limitation by drafting the plaint

(1) (1900) I. L. R., 25 Bom., 78.

so as to evade all reference to section 39 of the Specific Relief Act (No. I of 1877), and to claim a mere decalaration instead of the full relief prescribed by that section. It is open to question how far litigants should be encouraged to claim the benefit of the general article 120 of the first schedule to the Indian Limitation Act by going out of their way to word their plaint so as to escape the application of article 91. Regard should undoubtedly be had to the essence of the suit rather than to the particular colouring sought to be put upon it by plaintiff. I am content, however, to deal with this case on the assumption that article 120 applies. If so, the test which I would suggest is whether the present suit could or could not have been instituted prior to what the plaintiff alleges to be the origin of his cause of action, namely, the day on which the defendant in some way, not clearly specified, showed an intention to institute a suit in respect of the money apparently due on the face of this bond. In my opinion, if the plaintiff had come into court within a year, or within a month, or within a week, of the execution of this deed, alleging that he had been induced to execute it as a matter of policy, and (as his witnesses have deposed) in order to protect the property therein referred to from the attacks of creditors whom the plaintiff feared, but that he had repented of his conduct and realized that so long as the deed was in existence, the defendant might make a dishonest and improper use of it against him, he would have had a proper and valid cause of action for the very declaration which he seeks in the present case. On this ground, therefore, it seems clear to me that the right to sue for a declaration in respect of this bond accrued to the plaintiff on the day on which it was executed, and that time was always running against him. I, therefore, concur in the finding that the present suit was rightly dismissed by the learned District Judge.

BY THE COURT.—The order of the Court is that we dismiss the appeal with costs.

Appeal dismissed.

1915
July, 9.

Before Mr. Justice Tudball and Mr. Justice Rafiq.

ABDUL HAKIM AND OTHERS (DEFENDANTS) *v.* KARAN SINGH AND ANOTHER (PLAINTIFFS) AND RAHIM ALI KHAN AND OTHERS (DEFENDANTS)*

Civil Procedure Code (1908), order II, rule 2—Omission to sue for right relief—Maintainability of subsequent suit.

Where a plaintiff knew what relief he was entitled to and deliberately omitted to claim the right relief, his subsequent suit in respect of the same cause of action for the right relief was held to be barred by the provisions of Order II, rule 2., of the Code of Civil Procedure.

THE facts of this case are fully set forth in the judgement.

Mr. *B. E. O' Conor* (with him Maulvi *Iqbal Ahmad*), for the appellants.

Babu *Piari Lal Banerji*, for the respondents.

TUDBALL and RAFIQ, JJ. :—The facts which have given rise to this appeal are as follows: Rahim Ali Khan, one of the defendants respondents, was the owner of 7½ biswas in village Dastra. On the 5th of December, 1902, he executed a sale-deed in respect of six biswas out of the 7½ biswas in lieu of Rs. 14,000, in favour of Abdul Hakim Khan and his three minor sons. Out of the consideration the sum of Rs. 12,000 was left with the vendees for the discharge of two prior mortgages, namely, Rs. 6,000 were to be paid on account of a usufructuary mortgage to the credit of Har Bhajan Lal and others, mortgagees, and Rs. 2,924-5-0 were to be paid to one Lala Sant Lal for a simple mortgage. It was further agreed that any balance left over, after payment to the two prior mortgagees, would be repaid to the vendor; the payments to the two prior mortgagees were to be made at stated times which were mentioned in the sale-deed. The prior mortgagees were admittedly not paid on the date mentioned in the sale-deed. On the 12th of September, 1912, Rahim Ali Khan executed a deed of assignment in favour of Karan Singh and Ahmad Ali Khan in respect of the money due from the vendees, that is, the balance of the purchase money and damages on account of non-payment of the prior mortgages on the dates mentioned in the sale-deed. On the 9th of January, 1913, Karan Singh and Ahmad Ali Khan, the assignees, instituted the suit out of which this appeal has arisen for the recovery of Rs. 9,000, the amount said to be due on account of damages and the balance

*First Appeal No. 9 of 1914, from a decree of Sushil Chandra Banerji, Additional Subordinate Judge of Aligarh, dated the 26th of September, 1913.

of purchase money. The claim was brought against the vendees and against Rahim Ali Khan and others. The claim was resisted on various pleas one of which was that it was barred by order II, rule 2, of the Code of Civil Procedure. The learned Subordinate Judge in whose court the suit was filed decreed it in part. The vendees have preferred the present appeal. They challenge the decree against them on the ground, among others, that the suit is not maintainable in view of the provisions of order II, rule 2, of the Code of Civil Procedure. The argument is based on the allegation that on the 11th of September, 1905, Rahim Ali Khan brought a suit in the court of the Subordinate Judge of Aligarh for the cancellation of the deed of the 15th of December, 1902, against the appellants on the allegation that the latter had failed to carry out their part of the contract by not paying the prior mortgagees and not paying him the balance of the purchase money. The said claim was dismissed on the ground that the remedy sought by Rahim Ali Khan was not open to him, as the non-payment of sale price or the non-fulfilment of some of the terms of the contract of sale did not entitle the vendor to ask for cancellation of the sale. It is contended on behalf of the appellants that the cause of action alleged in the suit of the 11th of September, 1905, was the same as the cause of action stated in the present suit, namely, the breach of contract by the appellants. It was open to Rahim Ali Khan in the former suit to sue for damages and the return of the unpaid sale price and that his omission to do so bars the present suit under order II, rule 2, of the Code of Civil Procedure. In support of this contention the learned counsel for the appellants relies on the wording of the said provisions of law and on the following cases: *Rangayya Goundan* v. *Nanjappa Rao* (1); *Badri Bisal* v. *Musammat Lalta Koer* (2); *Raja Bahadur Shiv Lal Moti Lal* v. *Rajeevappa Pampanna* (3). For the respondents the reply is that the provisions of order II, rule 2, of the Code of Civil Procedure do not apply to the present case inasmuch as the remedy sought by Rahim Ali Khan in his former suit was misconceived and could not be granted to him. It is said that where

(1) I. L. R., 24 Mad., 491. (2) (1900) 10 Oudh Cases, 41

(3) 11 Bom. L. R., 46.

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a plaintiff sues for a relief to which he is not entitled a subsequent suit by him for the right relief on the same cause of action is not barred by order II, rule 2 of the Code of Civil Procedure. In support of his contention the learned counsel for the respondents has relied on the following cases: *Piari* v. *Khiali Ram* (1); *Darbo* v. *Kesho Rai* (2); *Sarsuti* v. *Kunj Behari Lal* (3); *Mohan Lal* v. *Bilaso* (4); *Bande Ali* v. *Gokul Misir* (5); *Musammat Prab Debi* v. *Harkishn Das* (6); *Musammat Parmeshri* v. *Vasdeo* (7).

The strongest cases for the respondents are those reported in Indian Law Reports, 3 All., page 857, and the Punjab Records for 1885, case No. 35, page 65. If it be conceded that the propositions of law laid down in the said two cases is correct, it does not help the respondents in the present ease, for it was laid down in those cases that where a plaintiff has asked for a wrong relief presumably under a misapprehension of what relief he is entitled to seek, his subsequent suit for the right relief is not barred. In the present case we find on reference to the plaint of the suit of the 11th of September, 1905, that Rahim Ali Khan knew perfectly well that he was then entitled to claim both the damages and the balance of sale-price. In fact he stated in paragraph 9 of his plaint that he was entitled to recover damages and the balance of unpaid price from the defendants of the suit as well as ask for the cancellation of the sale-deed, but he was for the present asking merely for the cancellation of the sale and that he would subsequently sue in respect of the other reliefs. The cases relied upon by the learned counsel for the respondents do not go the length of saying that in a case like the present where Rahim Ali Khan knew perfectly well what relief he was entitled to and he deliberately omitted to claim the right relief, that his subsequent suit in respect of the same cause of action for the right relief does not stand barred by the provisions of order II, rule 2. It is clear that Rahim Ali Khan was entitled to more than one relief on his own statement in the plaint of 1905. He deliberately chose to sue in respect of one and omitted to sue in respect of the

(1) (1881) I. L. R., 3 All., 857.
(2) (1879) I. L. R., 2 All., 356.
(3) (1883) I. L. R., 5 All., 345.
(4) (1892) I. L. R., 14 All., 512.
(5) (1911) 9 A. L. J., 111.
(6) Punj. Rec., 1884, C. J., 110.
(7) Punj. Rec., 1885, C. J., 65.

others and he did not obtain the leave of the court in respect of the reliefs which he had omitted. The present claim therefore stands clearly barred under order II, Rule 2, as the cause of action in the two suits is exactly the same.

BY THE COURT:—

The appeal therefore prevails and we allow it. The decree of the lower court is set aside and the claim of the plaintiffs is dismissed with costs in both courts. The objections filed by the plaintiffs as regards the amount disallowed by the court below are also dismissed with costs.

Appeal decreed.

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July, 9.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Rafiq.

KUNDAN LAL (PLAINTIFF) *v.* JAGANNATH (DEFENDANT).*

Act No. IX of 1872 (Indian Contract Act), sections 59—61—Appropriation.

An appropriation of payment must be made by the debtor at the time of paying and by the creditor at the time of receiving the money. If neither of them makes the appropriation the law appropriates the payment to the earliest debt.

Sections 59 to 61 of the Indian Contract Act enacted the rule of the Civil Law as laid down in *Clayton's case* (1) with certain modifications.

THE material facts were as follows:—

The bond in suit was executed on the 10th of September, 1910. The defendant pleaded payment by cheque. The plaintiff alleged that there were several debts due to the plaintiff from the defendant and that payment was made in respect of debts other than that in suit and that the documents paid off had been returned to the defendant. The court below held that at the time of the payment neither party had appropriated the money to a particular debt and as the debt earliest in time was the debt in suit the law appropriated the payment to this particular debt under section 61 of the Contract Act. The suit was therefore dismissed.

The Hon'ble Munshi *Gokul Prasad* (with him The Hon'ble Dr. *Tej Bahadur Sapru*), for the appellant:—

The bond in suit remained with the plaintiff even after payment by cheque was made by the defendant. The presumption is that there was some other debt in respect of which the money

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* Second Appeal No. 1056 of 1914, from a decree of C. E. Guterman, Additional Judge of Moradabad, dated the 15th of April, 1914, reversing a decree of Kali Das Banerji, City Munsif of Moradabad, dated the 18th of December, 1913.

(1) (1816) 1 Mer., 572 (604).

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was paid. The plaintiff says that there were other bonds which were returned. It is therefore for him to show that there was no other debt due by him to the plaintiff. The court below has not decided this question. The court below is wrong in holding that the law appropriated the payment to this particular debt. The debtor, no doubt, has the first option. But when he fails to appropriate, the creditor may make the appropriation even up to the last moment. There is no limit of time fixed by the Contract Act within which the appropriation is to be made. The creditor can exercise his right whenever he pleases. The rule of English Law is that a creditor can exercise his option even up to the time when the case goes to the jury. The fact that he sues upon the bond amounts to an election, viz. that he did not appropriate it to the debt about which the suit was brought, *Seymour* v. *Pickett* (1). The rule laid down by *Clayton's Case,* (2) is no longer good law. In any event it applies to current accounts only, which is not the case here: *Cory Brothers and Company Limited* v. *The Owners of the Turkish Steamship Mecca* (3).

Pandit *Kailash Nath Katju,* for the respondent:—

The nature of the transaction was that the plaintiff advanced money to the defendant from time to time, accepted money whenever defendant paid it and struck the balance every year and carried it to next year's account. There was only one debt payable. In any case the payment not having been appropriated by the parties the rule laid down by the Indian Contract Act would apply. Section 61 enacted that the payment must be applied to the debt earliest in date which was the debt in suit. The Legislature did not contemplate that the creditor could make the appropriation whenever he pleased. The appropriation must be made when the money is received by the creditor. The provisions of section 61 are imperative. If the creditor was at liberty to make an appropriation whenever he liked section 61 might be taken out of the statute-book, for the right of the creditor to appropriate would exist for ever. The right to appropriate could not therefore be given a retrospective effect.

(1) (1905) 1 K. B., 715. (2) (1816) 1 Mer., 572 (604).

(3) (1897) A. C., 286.

It is no doubt true that recent authorities in England have held otherwise and have gone so far as to hold that the creditor may exercise his right of appropriation at any time before the verdict of the jury. But the provisions of the Indian Contract Act which was enacted in 1872 should not be construed in the light of these recent cases in England. Even in England at one time there was considerable divergence of opinion, and the Indian Legislature has clearly adopted the view embodied in sections 60 and 61 of the Contract Act in preference to the other, and has thereby followed the rule of the Roman Law with certain modifications. See *Clayton's case* (1) for a full discussion of the state of authorities at that time. This case is, however, well within the English authorities. The course of dealings between the parties shows that all debts formed part of one continuous running account, and the payment made by the debtor was entered without any specification on the credit side, and went to discharge the earliest items on the debit side: *Bodenham* v. *Purchas* (2); *In re Sherry. London and County Company* v. *Terry* (3).

The Hon'ble Munshi *Gokul Prasad*, was heard in reply.

RICHARDS, C J, and RAFIQ, J. :—This appeal arises out of a suit upon foot of a simple money bond, dated the 10th of September, 1910. The defendant pleaded payment. The court of first instance decreed the plaintiff's claim. The lower appellate court found that the defendant had made a payment by a cheque; that the plaintiff had not made any appropriation of the payment, and that accordingly, the payment should be credited to the earliest debt then due by the defendant to the plaintiff which was the bond sued upon. The lower court says that the way the accounts were kept between the plaintiff and the defendant was that on the one side all advances made by the plaintiff to the defendant were entered and on the other side all the payments that were made to the plaintiff by the defendant. He seems to have been prepared to hold that from the way the account was kept the plaintiff must be deemed to have from time to time appropriated the payments to the earliest debts. The case, however, was really decided on

(1) (1816) 1 Mer., 572 (604). (2) (1818) 2 B and A, 39.
(3) (1884) 25 Ch. D., 692.

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the assumption that there had been no appropriation by either party and it is on this basis that the case has been argued before us.

Section 60 of the Contract Act is as follows:—"Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether the recovery is or is not barred by the law in force for the time being as to the limitation of suits."

Section 61.—"Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing the payment shall be applied in discharge of each proportionately."

The learned Additional Judge considered that if there had been no appropriation by either the debtor or the creditor the payment must be applied to the earliest debt which was the bond in suit.

It is contended on behalf of the appellant that a creditor can make his election as to the appropriation of the payments "up to the last moment" and he cites the case of *Seymour* v. *Pickett* (1) as showing that the appropriation can even be made when the plaintiff is being examined at the trial of the case. On the other hand, the respondents contend that under the provisions of section 61 of the Indian Contract Act, where there is no appropriation made by the debtor when paying the money or the creditor when receiving it, the law itself appropriates the payment in the manner provided by the section 61. The learned vakil refers to *Clayton's case* (2). At page 605 of the report the Master of the Rolls says:—"This state of the case has given rise to much discussion as to the rules by which the application of indefinite payments is to be governed. These rules we probably borrowed in the first instance from the Civil Law. The leading rule, with regard to the option given, in the first place to the debtor and to the creditor in the second, we have taken literally from thence. But,

(1) (1905) 1 K. B., 715. (2) (1816) 1 Mer., 604.

according to that law, the election was to be made at the time of payment, as well in the case of the creditor, as in that of the debtor *in re praesenti; hoc est statim atque solutum est:—cæterum, postea non permittitur*. If neither applied the payment, the law made the appropriation according to certain rules of presumption, depending on the nature of the debts, or the priority in which they were incurred. And as it was the actual intention of the debtor that would, in the first instance, have governed, so it was his presumable intention that was first resorted to as the rule by which the application was to be determined. In the absence, therefore, of any express declaration by either, the inquiry was what application would be most beneficial to the debtor. The payment was, consequently, applied to the most burthensome debt, to one that carried interest rather than to that which carried none,—to one secured by a penalty rather than to that which rested on a simple stipulation,—and if the debts were equal, then to that which had been first contracted."

Clayton's case was one in which there was a current account, *and it was held that the payments must be appropriated to the* debts earliest in date. Clayton's case was discussed in *Seymour* v. *Pickett* (1) and also in the case of *Cary Bros. and Co.* v. *The Owners of the Turkish Steamship "Mecca"* (2). At page 293 of the report of the last mentioned case Lord Macnaghten says:— "In 1816 when *Clayton's case* was decided there seems to have been authority for saying that the creditor was bound to make his election at once according to the rule of the Civil Law, or at any rate within a reasonable time, whatever that expression in such a connection may be taken to mean."

It seems to us that what the Indian Legislature did by sections 59—61 of the Indian Contract Act, was to adopt the rule of Civil Law with certain modifications. Unless the meaning of section 60 is that the debtor is to make his appropriation (if any) at the time of paying and the creditor to make his appropriation (if any) at the time of receiving the money, it is difficult to conceive what is the meaning of section 61 or how it could be applied. We think that the view taken by the court below was correct. If by reason of the manner in which the plaintiff kept the account, he is to be

(1) (1905) 1 K. B., 715. (2) (1897) App. C., 286.

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deemed to have appropriated the payment to the debt of earliest date, there is an end to the case. If on the other hand there was no appropriation by either debtor or creditor, the payment must be applied to the earliest debt due by the defendant to the plaintiff. This was the bond in suit. We dismiss the appeal with costs,

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

TULSHI RAM *v.* ABRAR AHMAD AND OTHERS.*

1915 July, 10.

Criminal Procedure Code, sections 145 *and* 522—*Possession—Ouster—Jurisdiction of Magistrate in exercise of powers under section* 145 *to dispossess one person and put another in possession.*

Under section 145 of the Code of Criminal Procedure a Magistrate of the first class has no power to oust one person and to place another in possession of a disputed property. Therefore the order of the District Magistrate in his capacity as the head of the Police, declining to carry out such an order is not open to revision by the High Court.

The only provision in the Code of Criminal Procedure which entitles a Magistrate to dispossess a person of property and replace him by another who is entitled, is section 522 of the Code, and for the purpose of exercising the powers therein granted, it is necessary that there should have been a conviction for an offence.

THE facts of this case are fully set forth in the judgement of the Court.

Babu *Satya Chandra Mukerji*, for the applicant.

Dr. *S. M. Sulaiman*, for the opposite parties.

The Assistant Government Advocate (Mr. *R Malcomson*) for the Crown.

TUDBALL, J.—The applicant has come to this Court on revision in the following circumstances:—There is a certain house which is in dispute between him and the opposite party and he applied to a Magistrate to take action under section 145 of the Code of Criminal Procedure. On the 5th of December, 1914, the Magistrate passed an order under section 145 calling upon the parties concerned in the dispute to attend his court and to put in written statements of their respective claims. The Magistrate proceeded to make his enquiry and he came to the conclusion that Tulshi Ram had

* Criminal Revision No. 450 of 1915, from an order of L. M. Stubbs, District Magistrate of Bijnor, dated the 19th of May, 1915.

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TULSHI RAM v. ABRAR AHMAD.

been wrongfully dispossessed on the 25th of November, 1914, by the opposite party. He accordingly treated him as having been in possession on the date of his order of the 5th of December, 1914, acting under the first of the provisos of clause 4 of section 145. He thereupon passed an order under clause 6 of that section declaring Tulshi Ram to be entitled to possession of the house until evicted therefrom in due course of law, and he forbade all disturbances of such possession until such eviction. So far the order of the Magistrate appears to have been good and well within his jurisdiction. He, however, added the following sentence:—"The possession of the house in question will be given to Tulshi Ram through the police." This latter portion of his order is based upon no provision in the Code of Criminal Procedure of which I am aware. Chapter XII nowhere gives a first class Magistrate any such power as to oust one person and to place another person in possession. The only provision in the Code of Criminal Procedure which entitles a Magistrate to dispossess a person of property and replace him by another person who is entitled, is section 522 of the Code, and for the purpose of exercising powers therein granted, it is necessary that there should have been a conviction of an offence. This latter portion therefore of the Magistrate's order, that the possession of the house could be given to Tulshi Ram through the police, appears to be *ultra vires* completely. Tulshi Ram in good faith applied to the Magistrate to enforce this portion of the order. The Magistrate sent on the petition to the Superintendent of Police asking that it might be done and the Deputy Superintendent of Police might be deputed to see the order carried out. The Superintendent of Police referred the matter to the District Magistrate, pointing out that the order should have come from the District Magistrate and expressing his readiness to maintain order and peace. He seems in his order of reference to have assumed that the dispossession was to be carried out by some revenue official. On this the District Magistrate passed an order which is the subject of revision; that order being "I am not going to order actual possession to be given by the police." In other words the District Magistrate, who is the district head of the police, declined to carry out the order of the first class Magistrate that the opposite party should be dispossessed by the police.

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It is against this order that Tulshi Ram has come to this Court in revision. In the circumstances of the case the order of the first class Magistrate being, as I have pointed out, *ultra vires*, the District Magistrate's order declining to allow the police to be utilized for the purpose of carrying out an illegal order is in my opinion a very proper order indeed with which I would not interfere. It seems to me that it is an order which is not open to revision by this Court at all. It is curious that under section 145 of the Code, the Magistrate is allowed to treat a person, who has been wrongly and forcibly dispossessed, as having been in actual possession on the date on which he passed his initial order under clause 1 of the section, while the section provides no machinery under which or through which the court may proceed to remove the wrong-doer from possession and put the other man in his place. As far as I can see the remedy for Tulshi Ram in the present case is to make a complaint in respect of his wrongful and forcible dispossession and to prosecute the other side, and if the Magistrate should convict, then it would be open to him to apply to the Magistrate to exercise the powers granted by section 522 of the Code. It is quite clear that in proceeding under section 145, as the law stands, it is impossible for the Magistrate to forcibly turn out one person and place another in possession of the property. The application is dismissed.

Rule discharged.

APPELLATE CIVIL.

1915
July, 16.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

KEDAR AND OTHERS (PLAINTIFFS) *v.* DEO NARAIN AND OTHERS (DEFENDANTS)*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 32—*Suit for possession of portion of holding—Suit maintainable.*

All that section 32 of the Tenancy Act provides against is the splitting up of a holding or the distribution of the rent so as to bind the land-holders. Clause 2 does no more than enact that a suit brought for such a purpose shall not be entertained by a Civil or Revenue Court; but where a plaintiff sues for possession of a portion of a fixed rate tenancy alleging that he is owner thereof and the defendant is a trespasser, such a suit is not barred by

* Appeal No. 13 of 1915, under section 10 of the Letters Patent.

the provisions of section 32 of the Agra Tenancy Act, 1901, *Najibullah* v. *Gulsher Khan* (1) followed.

THE facts of this case are fully set out in the judgement.

Pandit *Braj Nath Vyas*, for the appellants.

Mr. *M. L. Agarwala*, for the respondents.

RICHARDS, C. J., and BANERJI, J.:—This appeal arises out of a suit in which the plaintiff claimed one biswa, which was alleged to be part of 4 biswas which constituted a fixed rate holding. The lower courts and this Court have dismissed the suit as being barred by section 32 of the Tenancy Act and as having been concluded by the authority of the case of *Achhey Lal* v. *Janki Prasad* (2). Section 32 of the Agra Tenancy Act provides that "no division of a holding or distribution of the rent payable in respect thereof, made by the co-owners therein shall be binding on the land-holder unless it is made with his consent." Clause (2) provides that "no suit or other proceeding for the division of a holding or distribution of the rent thereof shall be entertained in any Civil or Revenue Court." It is quite clear that all that section 32 provides against is the splitting up of a holding or the distribution of the rent so as to bind the land-holders. Clause (2) does no more than enact that a suit brought for such a purpose shall not be entertained by a Civil or Revenue Court. In the present case the plaintiff alleges that he has become the owner, entitled to possession, of portion of a fixed rate tenancy and that the defendant is a trespasser. He does not ask for the division of the holding nor for the distribution of the rent. He does not seek to bind the land-holder in any way by the suit he brings. It seems to us therefore that section 32 does not bar the present suit. We may mention that the case relied upon by the lower appellate court and the learned Judge of this Court has been overruled by the Full Bench decision in *Najib-ullah* v. *Gulsher Khan* (1). As the suit was decided on a preliminary point in the lower courts the case must be remanded. We accordingly allow the appeal, set aside the decree of this Court and also of both the courts below, and remand the case to the court of first instance through the lower appellate court with directions to re-admit the suit under its original number in the file and proceed to hear and

(1) (1906) I. L. R., 29 All., 66. (2) (1909) I. L. R., 31 All., 543.

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determine the same according to law. Costs here and hitherto will be costs in the cause.

Appeal decreed, cause remanded.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1915 July, 17.

NATHU AND ANOTHER (PLAINTIFFS) *v.* GOKALIA AND ANOTHER (DEFENDANTS).*

Act (Local) No. II of 1901 (Agra Tenancy Act), section 22—Occupancy holding—Succession—Hindu Law.

One P an occupancy tenant died while the Rent Act of 1881 was in force leaving a widow and a daughter him surviving. The widow entered into possession and died after the present Tenancy Act had come into force. The present suit was brought by the brothers and nephews of P to eject the daughter and to get possession of the holding. *Held* that the plaintiffs had no title either under section 22 of the Agra Tenancy Act or under Hindu Law.

THE facts of this case were as follows:—

The plaintiffs' suit was for possesion of an occupancy holding. The holding at one time belonged to one Parbhu. He died before the present Tenancy Act came into force. He was succeeded by his widow, who remained in possession for a number of years and died after the present Act came into force. The plaintiffs alleged themselves to be brothers and nephews of Parbhu, and two of them allege that they were joint in cultivation with Parbhu. The principal defendant is the daughter of Parbhu. The court of first instance dismissed the plaintiffs' suit and this decision was affirmed by the lower appellate court.

Mr. *M. L. Agarwala*, for the appellants.

Pandit *Mohan Lal Sandal*, for the respondents.

RICHARDS, C.J., and BANERJI, J. :—This appeal arises out of a suit in which the plaintiffs claimed possession of an occupancy holding. The holding at one time belonged to one Parbhu. He died before the present Tenancy Act came into force. He was succeeded by his widow, who remained in possession for a number of years and died after the present Act came into force. The plaintiffs alleged themselves to be brothers and nephews of Parbhu, and two of them allege that they were joint in cultivation

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* Second Appeal No. 1175 of 1914, from a decree of Saiyid Muhammad Ali, District Judge of Moradabad, dated the 20th of May, 1914, confirming a decree of Harihar Prasad, Munsif of Haveli, dated the 20th of February, 1914.

with Parbhu. The principal defendant is the daughter of Parbhu. The court of first instance dismissed the plaintffs' suit and this decision was affirmed by the lower appellate court.

On behalf of the appellant the case of *Musammat Sumari* v. *Jageshar* (1) has been cited ; also an unreported decision in Second Appeal No. 1148 of 1914. On the other side, the case of *Dulari* v. *Mul Chand* (2), and also the case of *Deoki Rai* v. *Musammat Parbati* (3) are cited. It seems to us that the plaintiff in a suit for ejectment had to prove a title vested in him which gave him a right to the possession of the land in dispute. Section 22 of the Agra Tenancy Act provides for the devolution of the interest of an occupancy tenant, but it is perfectly clear from the language of the section that it only provides for such devolution where the tenant dies after the passing of the Act. If we regard Parbhu's widow as the full tenant of the occupancy holding, the plaintiffs have no right, because they are not the male lineal descendants of Parbhu's widow, nor did they share in the cultivation with her. If we consider that Parbhu was the last full tenant and that his widow only succeeded to a widow's estate, then it seems to us that section 22 of the Tenancy Act has not provided for the devolution in such a case. It is admitted that at the time of Parbhu's death the present plaintiffs could not nave succeeded even if Parbhu left no widow In the unreported case to which reference has been made a learned Judge of this Court says "the Board of Revenue appears to have taken a decided view that in circumstances like the present a succession would be governed by the provisions of section 22 of Act II of 1901." We doubt if this statement is quite accurate. So as far we are aware the practice of the Board of Revenue is to look upon the party who has succeeded to the occupancy holding as the "full tenant." We have pointed out that even if this be the true aspect, the plaintiffs would have no right to succeed. We think that in principle the present case is governed by the case of *Deoki Rai* v. *Parbati* (3). We think that the view taken by the courts below was correct and ought to be affirmed. We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) (1913) 23 Indian Cases, 7. (2) (1910) I. L. R., 32 All., 314.

(3) (1914) 23 Indian Cases, 100.

1915
July, 21.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

DRIGPAL SINGH AND ANOTHER (DEFENDANTS) *v.* KALLU AND OTHERS (PLAINTIFFS)*

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 134—Limitation—Mortgage—Sale by mortgagee—Suit for redemption by mortgagor against mortgagee and vendees—Plea of purchase for consideration—Omission of the words "in good faith" in article 134.

The omission of the words 'in good faith' from article 134 of the first schedule to the Limitation Act of 1908 does not entitle a person who purchases with full knowledge that his vendor's title is merely that of mortgagee to the benefit of that article.

THE facts of this case are fully set out in the judgement.

Mr. *M. L. Agarwala*, for the appellants.

Munshi *Gulzari Lal*, for the respondents.

RICHARDS, C.J., and BANERJI, J. :—This appeal arises out of a suit to redeem a mortgage made in the year 1843. The facts are a little complicated, but it is unnecessary to state them in detail for the purpose of deciding the present appeal. It appears that in the years 1878 and 1879 persons in whom the mortgagee rights were then vested made transfers in favour of certain persons who are now represented by the appellants. In these transfers words are used descriptive of the interest transferred which would be appropriate if the transferor was absolute owner and not merely mortgagee. On the other hand, the words are not altogether inappropriate as descriptive of the right of a mortgagee in possession. The lower appellate court has found, in concurrence with the court of first instance, that the actual interest which the transferors had at the date of the transfers was that of mortgagees in possession. It has also found, (and given good reasons for its findings) that the transferees knew what the interest of the transferors was. After the transfer the name of the transferee was entered in the revenue papers as owner of the "mortgagee" interest. It is contended here that, notwithstanding the findings of the court below, article 134 of the Limitation Act bars the suit. Article 134 is as follows :—"To recover possession of immovable property conveyed or bequeathed in trust or mortgaged, and afterwards transferred by the trustee

*Second Appeal No. 572 of 1914, from a decree of H. E. Holme, District Judge of Aligarh, dated the 6th of March, 1914, confirming a decree of Piare Lal, Munsif of Jalesar, dated the 28th of May, 1913.

or mortgagee for a valuable consideration." The period is twelve years from the date of the transfer.

It is admitted that a mortgagor has sixty years within which to bring a suit for redemption. It is also admitted that where the mortgagee transfers his mortgagee rights as such the transferee stands in no better position than the transferor. It is, however, urged that if the words used in the deed of transfer are applicable to the transfer of an absolute interest, then article 134 applies, no matter whether the transferee was aware of the nature of the interest of the transferor or not. We find great difficulty in accepting this contention. The main argument in favour of it is based on a comparison between the words of article 134 in the recent Limitation Acts and article 134 in Act IX of 1871. In that Act the article was as follows:—" To recover possession of immovable property conveyed in trust or mortgaged and afterwords purchased from the trustee or mortgagee '*in good faith*' and for value."

It is said that the absence of the words "*in good faith*" in the recent Act shows that knowledge of the nature of the transferor's title is quite immaterial. Reliance is placed upon the case of *Yesu Ramji Kalnath* v. *Balkrishna Lakshman* (1). This case seems to have been considered in a later judgement of the same Court in the case of *Pandu* v. *Vithu* (2). We think that there is no reason for holding that the omission of the words "*in good faith*" from the recent Act entitled the person who purchased with full knowledge that his vendor's title was merely that of mortgagee to the benefit of article 134. It may have been that the words were considered not altogether appropriate and that their retention would throw the *onus* on the transferee of proving that he had no knowledge of his vendor's title. This would be in many cases a hardship upon the person in possession of the property; he would have to prove a negative possibly after the lapse of many years. Whatever may be the reason for omitting the words, we cannot think that the Legislature intended that the mortgagee and his transferee should be able to shorten the period allowed by law for redeeming a mortgage by wilfully and to the knowledge of both misdescribing the interest

(1) (1891) I. L. R., 15 Bom., 583. (2) (1891) I. L. R., 19 Bom., 140.

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DARSPAL SINGH v. KALLU.

transferred in the deed of transfer. In our opinion having re to the findings of the court below that the transferees fron mortgagees had actual knowledge that their vendor's title merely that of a mortgagee and that they had no belief that were purchasing an absolute interest, the decision of the c below should be affirmed.

The only other point is a question of calculation. Thi a matter which was not brought to the notice of the lower ap late court and we do not think it can be entertained here.

The result is that the appeal fails and is dismissed with co

Appeal dismis.

1915 July, 26.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

SURAJ BHAN (DEFENDANT) v. SOMWARPURI (PLAINTIFF) AND RANDH SINGH (DEFENDANT)*.

Act (Local) No. II of 1903 (Bundelkhand Alienation of Land Act), section Agricultural tribe—Suit for pre-emption—Sanction.

The sanction contemplated in section 3 of the Bundelkhand Alienatio Land Act, 1903, applies to a voluntary transfer, and there is no provision i Act which entitles an intending pre-emptor to get the sanction of the Coll to bring a suit for pre-emption.

Therefore a court is not entitled to grant a decree for pre-emption person who is not entitled to purchase the property in question not bei member of the agricultural tribe within the meaning of section 3 of the Bun khand Alienation of Land Act, 1903.

THE facts of this case are fully set out in the judgement.

Babu *Durga Charan Banerji* and Munshi *Haribans Sah* for the appellant.

The Honble Dr. *Sundar Lal*, for the respondents.

RICHARDS, C.J., and TUDBALL, J.:—This appeal arises out o suit for pre-emption. The plaintiff pre-emptor has been found both the courts to be a person who was *not* entitled to purchase t property in question having regard to section 3 of the Bundelkha Alienation of Land Act, 1903, inasmuch as he was not a member an agricultural tribe. The court of first instance dismissed t plaintiff's suit on this ground. The lower appellate court seems have considered that the court might make a decree in the plaintiff favour subject to the consent of the Collector to be subsequent

* First Appeal No. 65 of 1914, from an order of S. R. Daniels, District Judg of Allahabad, dated the 16th of February, 1914.

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obtained, and remanded the case. We think the view taken by the learned District Judge was not correct. The plaintiff's alleged cause of action was the fact that the vendor being bound by a custom of pre-emption to first offer the property to the plaintiff, did not do so. We think that the Act, which provides that the property should not be sold to the pre-emptor, entirely absolved the vendor from any obligation to first offer the property to the pre-emptor. It is said that the subsequent sanction of the Collector might smooth over all these difficulties. It seems to us that the court's jurisdiction was either to grant a decree for pre-emption or not to do so. It would be obviously open to many objections that the sale of the property should be kept in abeyance until such time the Collector sanctions or refuses to sanction the sale. We may also point out that it is extremely doubtful whether the Collector could give any such sanction to a pre-emptor. There is no provision in the Act which entitles an intending pre-emptor to get the sanction of the Collector to bring a suit for pre-emption. If the sanction of the Collector could not be obtained before the bringing of the suit, it seems *a fortiori* that he could not grant the sanction subsequently. The sanction contemplated in section 3 is clearly in the case of a voluntary transfer We allow the appeal, set aside the order of the learned District Judge and restore the decree of the court of first instance with costs in all courts.

Appeal decreed.